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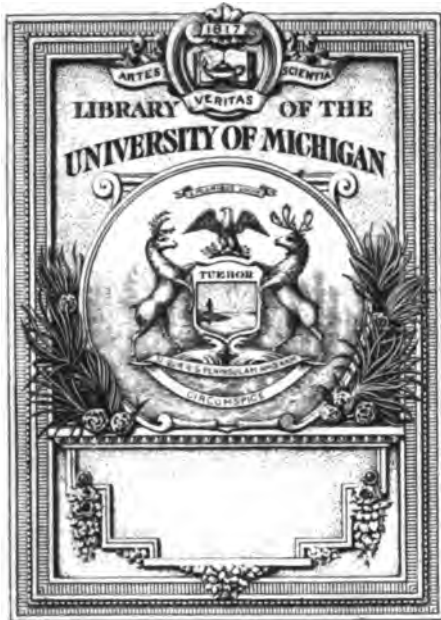
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# DEPARTMENT REPORTS

OF THE

STATE OF NEW YORK (State)

CONTAINING THE

DECISIONS, OPINIONS AND RULINGS

OF THE

State Officers, Departments, Boards  
and Commissions

AND

MESSAGES OF THE GOVERNOR

---

OFFICIAL EDITION

JOSEPH A. LAWSON, 'Miscellaneous Reporter

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# STATE OFFICIALS

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# STATE OFFICIALS

Corrected to date

(Address, Albany, N. Y., except where otherwise indicated)

1916

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# PUBLIC SERVICE COMMISSION

## FIRST DISTRICT

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In the Matter of the Hearing on the Complaint of PHILIP ORDOVER, as Assignee of the MANCHESTER RUBBER COMPANY, against THE EDISON ELECTRIC ILLUMINATING COMPANY OF BROOKLYN, as to Alleged Overcharges for Electric Current

Case No. 2038

(Public Service Commission, First District, July 13, 1916)

Electrical corporations — schedule of rates and charges under retail lighting contract should be charged to assignee of bankrupt customers in arrears and under maximum demand contract.

Electrical corporations — tariff schedules — provision for continuance of service to assignee of bankrupt customers recommended.

Upon a complaint of Philip Ordover against the Edison Electric Illuminating Company of Brooklyn that as assignee for the creditors of the business of a bankrupt customer of the respondent under a maximum demand contract he was charged for electric current for thirty-eight days under a retail lighting contract an excess of \$205.71 over what the charge would have been under the maximum demand contract, it appeared that the respondent refused to furnish current under the old contract for the failure of the complainant to pay an arrear of \$397.39 under said contract and that the complainant thereupon signed a retail lighting contract. *Held*, that if trustees or assignees in bankruptcy for the benefit of creditors adopt the executory contracts of their insolvents they are required to take them *cum onere*, and that as the complainant did not pay the amount due by his insolvent he could not require the Edison Company, and that company had no legal right, to furnish him with electrical current on other terms than those provided in its schedule on file with the Commission.

In the interest of public policy it is recommended that the electrical corporations under the Commission's jurisdiction file supplemental schedules containing provisions for the continuance of service to trustees or assignees of bankrupt customers under the contracts to said customers.

This proceeding was upon the complaint of Philip Ordover and was commenced by a resolution adopted on November 5, 1915, directing a hearing in the matter. On July 13, 1916, the Com-

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Public Service Commission, First District

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mission adopted the opinion of Commissioner Hayward, who presided at the hearings, and entered an order dismissing the complaint.

H. H. Whitman, for the Commission.

Philip Ordovery, the complainant, in person.

Hatch & Sheehan, by Ashley T. Cole, for the Edison Electric Illuminating Company of Brooklyn.

HAYWARD, Commissioner.— The complainant, Philip Ordovery, became the assignee for the benefit of the creditors of the Manchester Rubber Company on July 20, 1915, and received permission from the court to continue the business for a period of thirty days. Previously, the Manchester Rubber Company had been receiving electrical service, mainly for power purposes, under a "maximum demand contract" which was for a minimum period of one year, and at the time of the assignment the Manchester Rubber Company was in arrears in paying for current consumed in the amount of \$397.39. The assignee applied to the Edison Electric Illuminating Company of Brooklyn for service under the contract which the Manchester Rubber Company had at the time of the assignment, but the Edison Company refused to continue the old contract unless the assignee would pay the amount due thereunder at the time of the assignment. Not being willing or authorized to pay the arrears, the assignee signed a "retail lighting contract," which was the only other form the Edison Company offered to give him, the Edison Company at that time not having on file with the Commission a contract schedule providing for a continuation of service to an assignee, receiver or trustee under the circumstances of this case.

Electrical service was rendered the assignee from July 19 to August 26, 1915, and \$406.67, the amount charged therefor under the "retail lighting contract" was \$205.71 more than would have been charged under the "maximum demand contract" of the

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Public Service Commission, First District.

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Manchester Rubber Company. The assignee makes claim for this excess.

Trustees in bankruptcy or assignees for the benefit of creditors are not bound to adopt the executory contracts of their insolvents if it would be unprofitable to do so; but, "if they elect to assume such a contract, they are required to take it *cum onere* as the bankrupt enjoyed it, subject to all the terms and conditions, in the same plight and condition that the bankrupt held it." Collier Bankruptcy (9th ed.), 1027.

As it was not in the interest of the estate for the assignee to adopt the contract held by the Manchester Rubber Company by paying the amount due thereunder, he could not require the Edison Company, and that company had no legal right, to furnish him with electrical current on other terms than those provided for in its schedule on file with the Commission. It follows that, even if the Commission had the power to order a refund, the complaint must be dismissed.

It seems to me, however, that where, as often happens, a trustee in bankruptcy or other representative of an insolvent estate is directed to continue the business for a limited time, it would be in the interest of public policy that he should be entitled to receive current at the same rate formerly furnished the bankrupt. Indeed, the New York Edison Company now has such a service provision in its schedule; and I recommend that the secretary of the Commission transmit a communication to the electrical corporations subject to the Commission's jurisdiction which have not such a schedule on file, requesting that they advise the Commission whether they will file a supplemental schedule providing for a continuation of service similar to the schedule of the New York Edison Company.

Straus, Chairman, Whitney and Hervey, Commissioners, concurring; Hodge, Commissioner, absent.

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Public Service Commission, First District

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In the Matter of the Complaint of the VAUDEAU AMUSEMENT COMPANY, Against the EDISON ELECTRIC ILLUMINATING COMPANY OF BROOKLYN on Account of Alleged Incorrect Bills for Current Furnished

Case No. 2100.

(Public Service Commission, First District, August 18, 1916)

Electrical corporations, rates and charges, alternating current supplied to motor generators for operating a moving picture machine should be charged as power and not as light.

Use of electric current at night does not determine as to whether it is used for light.

Upon the complaint of the Vaudeau Amusement Company against the Edison Electric Illuminating Company of Brooklyn, for charging lighting rates for alternating current supplied to the complainant's motor generator which translated said current into direct current for operating a moving picture machine, *held*, that the test whether current is used for power or for lighting is at the point of delivery and consumption and as the point of consumption was at the motor, where the current was used for power and not for light, power rates should be charged.

The contention of the respondent, Edison Electric Illuminating Company of Brooklyn, that the current used at night for the operation of a moving picture machine is light and should be charged at lighting rates cannot be sustained as the respondent's schedule rates for power do not contain any restrictions as to the time of day when power rates apply.

This proceeding was upon the complaint of the Vaudeau Amusement Company and was started by a resolution adopted by the Commission on May 25, 1916, directing a hearing in the matter.

On August 11, 1916, the Commission entered an order providing as follows: "(1) That said Edison Electric Illuminating Company of Brooklyn be and hereby is forbidden to charge the Vaudeau Amusement Company for current furnished to said Vaudeau Amusement Company for operating its motor a rate in excess of that charged by said Edison Electric Illuminating Company for current used for power purposes as set forth in its schedule filed with this Commission."

On August 18, 1916, the Commission adopted an opinion of Commissioner Hayward, which is set out below.

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Public Service Commission. First District

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H. H. Whitman and J. H. Goetz, for the Commission.

J. Robert Rubin, for the Vaudeau Amusement Company.

T. S. Jones and C. E. Butz, for the Edison Electric Illuminating Company of Brooklyn.

HAYWARD, Commissioner.— This is a complaint brought by the Vaudeau Amusement Company, which conducts a moving picture theatre in the borough of Brooklyn, city of New York, against the Edison Electric Illuminating Company of Brooklyn, an electrical utility. The theatre of the complainant is in a district in which the respondent supplies only alternating current. The complainant, which uses direct current, installed a motor generator set. The alternating current supplied by the respondent is metered on the complainant's premises and is delivered to a motor owned by the complainant; this motor is connected with a dynamo, and the dynamo generates the direct current used by the complainant. All the equipment beyond the meter is owned by the complainant.

The respondent has no schedule on file with the Commission classifying electric service for moving picture purposes, and has only schedules for *light* and schedules for *power*. At the time the complaint was filed, the complainant was billed for electric current upon the basis of a lighting rate. The main issue relates to the question whether, under the circumstances shown, service to the complainant should, for rate purposes, be classified as that for power or that for light. There was another issue in regard to the determination of the maximum to be applied, but, as that involved merely an arithmetical computation, the matter was left for adjustment between the parties. But the difference in the charges upon the basis of power and upon the basis of lighting is substantial.

It is contended in behalf of the respondent that the lighting rate should apply, because the motor generator set is only a "translating" device. But the equipment used by the complainant is not the ordinary translator or "transformer." The current furnished at the motor is not transmitted beyond it in any form and whatever loss in power results from using the motor is sustained by the consumer.



Electric light is produced by a current of electricity passing through devices of different kinds called lamps. None of respondent's current ever reached complainant's lamps.

Electric power is produced by a current of electricity applied to a motor which by a belt or shaft connection drives other machinery. Respondent's current in this case drives complainant's motor and makes no difference whether that motor in turn drives a fan, a lathe, a dynamo, all or either. It is power, not light. From the motor to the dynamo, no current is transmitted, only power. The point of consumption therefore is at the motor, at which the current is used for power and not for lighting. The test whether the current is used for power or for lighting is at the point of delivery and consumption.

The respondent further contends that the period during which the current for this particular purpose is used is beyond the usual power period. But the respondent's schedules contain no such restriction in its charges for power. Indeed, as it is common knowledge that moving picture theatres in this vicinity are operated during the day time, when current for power is largely used, the period of use in this case may be assumed also to come within the usual period of power consumption. But even if used exclusively during the peak of the night load on respondent's plant, it would still be power.

Under its schedules the company could not charge the rate for light to a consumer who used its current for motor driven sewing machines at night or beyond the usual power period. No more can it base its charges to complainant on the time of day or night the current is used, simply because it is a dynamo, and not a sewing machine for which the power is used.

The Commission's finding, therefore, is that under the rate classification of the respondent on file with the Commission, the rate for power should govern the charges made to the complainant. All consumers belonging to the complainant's class and being similarly served should of course be treated alike. An order has therefore been entered forbidding the respondent to charge the complainant for current furnished to it for operating its motor a

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Public Service Commission, First District

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rate in excess of that charged by the respondent for current used for power purposes as set forth in the schedule filed with the Commission.

Hodge, Whitney and Hervey, Commissioners, concurring;  
Straus, Chairman, absent.

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In the Matter of the Hearing on the Complaint of ED. JANSEN  
against THE NEW YORK EDISON COMPANY as to Collective  
Consumption in Determining Rate

Case No. 2134

(Public Service Commission, First District, September 6, 1916)

**Electrical corporations — rates and charges — conjunctional service rider — current used by tenants not included in determining rates chargeable to landlord.**

**Electrical corporations — rates and charges — guaranteed consumption for wholesale rate — contract rider for inclusion of tenants' consumption for fulfillment of guarantee not to effect guaranteed consumption rate.**

Under a conjunctional service rider to a contract for electric current providing that on account of the close proximity of several buildings under the same ownership so that they may be served from one service the current for the buildings should be taken respectively to determine the rate chargeable to the landlord, the current used by the tenants should not be credited to the landlord for the purpose of charging him lower rates.

A rider to a contract with the New York Edison Company signed by the complainant, Ed. Jansen, the owner of several adjoining buildings, guaranteeing an annual consumption of 100,000 kilowatt hours and fixing a sliding scale of rates, provided that the current consumed by the tenants of said buildings should be credited to the consumption of 100,000 kilowatt hours guaranteed, the accounts of the tenants to have no other relation with said contract. The complainant, having used less than 100,000 kilowatt hours of current per year, contended that he was entitled to have all the current consumed by his tenants credited to him for the purpose of giving him the benefit of a lower step-rate than five cents per kilowatt hour charged by the respondent for the first 15,000 kilowatt hours of monthly consumption. *Held*, that the intent of the rider evidently was that the use of the current by the tenants should be applied only in fulfilling the guarantee, bringing the customer within the wholesale classification, but not for the purpose of securing rates within a class other than those obtained by the actual consumption of the customer, and that the complaint should be dismissed.

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This proceeding was begun by the adoption of a resolution based upon the complaint of Ed. Jansen, the resolution bearing date of August 23, 1916, and directing a hearing in the matter.

On August 30, 1916, a hearing was held and on September 6, 1916, pursuant to an opinion of Commissioner Whitney, who presided at the hearing, the Commission entered an order dismissing the complaint.

E. J. Crummey, for the Commission.

WHITNEY, Commissioner.— Complaint is made by Ed. Jansen, owner of the buildings upon premises Nos. 113-119 West Seventeenth street and 108-116 West Eighteenth street, in the borough of Manhattan, New York city, against the New York Edison Company, which supplies electric current to the premises of the complainant, with regard to the basis applied in determining the rate which the complainant should pay.

On October 6, 1910, an agreement was made between the complainant and the Edison Company for the supply of electric current to the premises mentioned, for a term of six years, which provided "that the aggregate use of current supplied under this contract shall not be less than 100,000 kilowatt hours per year," and fixed the following rate: For the first 15,000 kilowatt hours, monthly consumption, five cents per kilowatt hour; from 15,000 to 25,000 excess over 15,000 monthly consumption, four and one-half cents per kilowatt hour; from 25,000 to 35,000 excess over 25,000 monthly consumption, four cents per kilowatt hour; from 35,000 to 50,000 excess over 35,000 monthly consumption, three and one-half cents per kilowatt hour; all over 50,000 monthly consumption, three cents per kilowatt hour.

Attached to the contract were two riders, one relating to "conjunctural service" and the other relating to "owner's or lessee's service," as follows:

"(1) In view of the fact that the buildings enumerated in this contract are not more than 100 feet apart, are under a common ownership (leasehold) and may be served from one service the current required for them may be taken collectively in deter-

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mining the rate to which the undersigned is entitled under this contract.

"(2) In view of the exclusion of all other electric service from the building, and of a private plant for light or power during the term of the contract, that the electric current consumed by the tenants shall be credited to the consumption of 100,000 kilowatt hours annually guaranteed by the undersigned. The accounts of the tenants shall have no other relation with this contract."

During the term of the contract, the consumption of the complainant on all the buildings approximated 70,000 to 85,000 kilowatt hours a year, whereas the tenant of one of the buildings, the New York Mail Transportation Company, consumed approximately 400,000 kilowatt hours a year. The complainant in no year reached the guarantee requirement of 100,000 kilowatt hours a year, but the Edison Company credited the complainant with the electric current consumed by the tenant to the extent of making up the difference between the amount actually consumed by the complainant and the 100,000 kilowatt hours annually guaranteed, thus charging the complainant a flat rate of five cents per kilowatt hour for his consumption.

The complainant now claims, however, that he is entitled to a lower rate than five cents under the sliding scale, not because he personally used enough current to obtain the benefits of that scale, but because the current used by his tenant, combined with his own, would bring the aggregate to a point to which the lower rates were applicable. In other words, he claims that the consumption of the tenant should be applied, not only to fulfilling the guarantee of minimum consumption, but also to determining the rate which he shall pay for current.

The complainant contends that, under the provision in the conjunctive service clause that "the current required for them may be taken collectively in determining the rate to which the undersigned is entitled under this contract," if he is entitled to credit for any part of the current consumed in these buildings by the tenants which was not charged directly to his account, he is entitled to a credit for the entire consumption by the tenant. This paragraph relates wholly to the juxtaposition of the prop-

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erties, permitting their service under a common contract, though located on different streets. No reference is made to "tenants" in this clause, whereas specific reference to tenants is made in the other clause relative to owner's or lessee's service. The language "the current required for *them* may be taken collectively" refers to *buildings* and not to *tenants*, and covers service to be rendered to *complainant* in more than one building, and not to service to complainant and tenants. The fair intendment of the provision is that, in computing the consumption, the current required by *the complainant* for *them* (the buildings referred to in the contract) should be taken collectively in determining the rate. In other words, instead of having separate services for the several buildings, involving perhaps as many guarantees as buildings and additional equipment, all the current used by the complainant in all the buildings may be aggregated to make up the minimum guarantee or any amount necessary to obtain a rate lower than that applicable to the guarantee.

Moreover, the complainant contends that, under the provision in the owner's or lessee's service clause that "the electric current consumed by the tenants shall be credited to the consumption of 100,000 kilowatt hours annually guaranteed," if the entire consumption, including that of the tenants, had fallen below the guarantee, the Edison Company would have charged the complainant with a deficit, and that, therefore, the 100,000 kilowatt hours should be considered as a minimum guarantee and not as a limited amount against which the tenants' consumption may be applied. But the language in this clause negatives such a construction, for it provides that the tenants' consumption shall be "*credited* to the consumption of 100,000 kilowatt hours annually guaranteed." It does not provide that the tenants' consumption shall be credited to the complainant's consumption, but the consumption of "*100,000 kilowatt hours.*" It was evidently intended that the use of current by the tenants should be applied only in fulfilling the guarantee, bringing the customer within the wholesale classification, but not for the purpose of securing rates within a class other than those obtained by the actual consumption of the customer. The tenants' consumption could not be used for any

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other purpose, for the clause provided that, "The accounts of the tenants shall have no other relation with this contract." The complainant assumed no responsibility for the payment of the charges for the tenants' consumption; and the tenant evidently made its own contract for current directly with the Edison Company at rates commensurate with the quantity of service taken by it.

It is, therefore, my opinion that the consumption of the tenants should not, under the contract now construed, be applied for the purpose of determining the rate which the complainant should pay for current in addition to that of guarantee of the contract, and the complaint should be dismissed. No issue is presented as to the reasonableness of the provisions considered in this case, and no opinion is expressed thereon. This opinion is confined simply to the question of what are the rights of the parties under these provisions.

Strauss, Chairman, Hayward, Hodge and Hervey, Commissioners, concurring.

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In the Matter of the Hearing on Motion of the Commission in Respect of the EXTENSION OF THE BOSTON ROAD LINE OF THE UNION RAILWAY COMPANY OF NEW YORK CITY from East One Hundred and Seventy-seventh Street to East One Hundred and Eighty-first Street, in the Borough of The Bronx, City of New York

Case No. 2121

(Public Service Commission, First District, September 21, 1916)

Street railway corporations — service — extension of Boston Road line to One Hundred and Eighty-First Street — in the absence of franchises or of rights line extensions cannot be required by the Commission.

Street railway corporations — the Commission cannot compel one corporation to operate on the tracks of another where there is no franchise rights.

Street railway corporations — transfer arrangement preferable to short extension involving switching back of cars.

Street railway corporations — franchises and privileges — application for franchise voluntary act of corporation.

Upon a petition to require the Union Railway Company of New York City to extend the operation of its Boston road line from One Hundred

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and Seventy-Seventh street to One Hundred and Eighty-First street it appeared that company's franchise terminated south of One Hundred and Seventy-Ninth street. *Held*, that the Commission should not require a public utility to enter upon a territory for which it does not possess all the necessary franchise rights, otherwise the Commission would dispense with compliance by the utility with the safeguards which the law provided against the assumption by the utility of rights not conveyed to it.

No such identity of property rights exists between two street railroad corporations in the same system that the Commission may compel one of the companies without a franchise to operate on the tracks for which the other company has a franchise, and while the two companies may enter into an agreement for the joint use of the tracks the Commission has no power to compel them to make such an agreement.

Where the extension of a line for a short distance to the end of the tracks of a street railroad corporation is impracticable as involving the switching back of cars and an existing transfer arrangement affords better service the Commission is not warranted in ordering said extension.

A request of the petitioners that if the Commission should not order the respondent to operate the Boston road line to East One Hundred and Eighty-First street for the want of a local franchise right to that point it should recommend that an application be made for such franchise, cannot be granted as the determination of the matter is one for the judgment of the company's directors.

Upon a petition that the Commission direct the Union Railway Company of New York City to extend its Boston road line from East One Hundred and Seventy-seventh street northerly to East One Hundred and Eighty-first street, in the borough of The Bronx, the Commission adopted a resolution on July 13, 1916, directing a hearing in the matter. A hearing was held on July 19, 1916, before Commissioners Hayward and Whitney, and on September 21, 1916, pursuant to an opinion of Commissioner Hayward, adopted on that day, the Commission entered an order discontinuing the proceeding.

The further facts in the matter are set forth in the opinion adopted.

E. J. Crummey, for the Commission.

Harry B. Chambers, for the East Tremont Taxpayers' Association.

Edward A. Maher, Jr., for the Union Railway Company of New York City.

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HAYWARD, Commissioner.—This proceeding was commenced on motion of the Commission for the purpose of investigating a petition filed by interested persons asking that the Union Railway Company of New York city be ordered to extend its Boston road line from East One Hundred and Seventy-seventh street and Boston road northerly to East One Hundred and Eighty-first street and Boston Road, in the borough of The Bronx, city of New York. At the hearing the petition was amended so as to request that the railway company be directed to operate the line only to One Hundred and Eightieth street and that the Commission advise the extension to One Hundred and Eighty-first street.

Tracks are now laid on Boston road between One Hundred and Seventy-seventh street and One Hundred and Eightieth street, over which the New York City Interborough Railway Company operates two lines, the Bronx and Van Cortlandt Park line and the One Hundred and Eightieth street crosstown line. A switch is maintained on Boston road between One Hundred and Seventy-eighth and One Hundred and Seventy-ninth streets. During the rush hours the Boston road line is operated on a route between One Hundred and Twenty-eighth street on the south via Third avenue, Boston road, Walker avenue and Morris Park avenue and Van Nest. During the non-rush hours one-half of the service operates to West Farms square, at which point cars are turned back, but occasionally the cars are turned back at the switch between One Hundred and Seventy-eighth and One Hundred and Seventy-ninth streets.

The Boston road line is operated during the rush hours on a three and one-half minute headway between Morris Park avenue and One Hundred and Thirty-eighth street, and a seven minute headway south of One Hundred and Thirty-eighth street, no short line cars being operated and during the non-rush hours on a headway of five minutes between West Farms square and One Hundred and Twenty-eighth street, and of ten minutes between West Farms square and Morris Park avenue, the short line cars being turned back at West Farms square. The headway of the One Hundred and Eightieth street crosstown line is six minutes during rush hours and ten minutes during non-rush hours, and of the Bronx



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and Van Cortlandt Park line ten minutes during the rush hours and twelve minutes during the non-rush hours. The headway of the combined service between One Hundred and Seventy-seventh and One Hundred and Eightieth streets is, however, irregular, because the several lines are operated at different intervals.

Transfers are exchanged between the Boston road line and the other lines intersecting or connecting with it at West Farms square, so that a passenger may ride from or to East One Hundred and Eightieth street and Boston road at a five cent fare.

The petitioners urged the necessity for an extension to East One Hundred and Eighty-first street on the ground that passengers are inconvenienced by transferring at East One Hundred and Seventy-seventh street. There is an entrance to the Bronx park at One Hundred and Eightieth street and Boston road, through which there passed between July 1, 1915, and June 30, 1916, an attendance of 515,848 persons. There is a Magistrate's Court on East One Hundred and Eighty-first street near Boston road. The adjoining property on Boston road, One Hundred and Eightieth street and One Hundred and Eighty-first street contains public institutions, an amusement place, hotels and office and store buildings, which naturally attract a considerable number of persons who would, if they used the Boston road line, be better accommodated by through operation to East One Hundred and Eighty-first street. The railway company, however, asserts that the Boston road line does not transport enough persons destined to these places to necessitate the construction of the extension.

The power of the Commission to require the Union Railway Company to extend the Boston Road line north of One Hundred and Seventy-seventh street, either by car operation or by track construction, is dependent, in this case, upon the question whether the company possesses franchise rights to operate over the streets on which the extension is desired. The Commission should not require a public utility to enter upon a territory for which it does not possess all the necessary franchise rights, otherwise the Commission would dispense with compliance by the utility with the safeguards which the law has provided against the assumption by the utility of rights not conveyed to it.

No doubt exists that the New York City Interborough Railway Company possesses franchise rights for a street railroad between One Hundred and Seventy-seventh and One Hundred and Eightieth streets. It has been suggested by the complainants that, in view of the fact that the Union Railway Company and the New York City Interborough Railway Company are a part of one system under the same management, such an identity of property rights exists that the Commission may compel the Union Railway Company to operate over the streets for which the New York City Interborough Railway Company has a franchise. The Union Railway Company could, of course, enter into an agreement with the New York City Interborough Railway Company to use the tracks and rights of the latter for operation between One Hundred and Seventy-seventh and One Hundred and Eightieth streets; but the law gives the Commission no power to compel the companies to make such an agreement. The two companies are two separate corporate entities and the fact that they are under a common control does not, unfortunately, confer authority upon the Commission to compel them to use their property interchangeably.

There is no evidence in this case that the Union Railway Company or any of its predecessors possesses a franchise for constructing or operating tracks north of One Hundred and Seventy-seventh street on Boston road, unless it be incidental to other rights. The Union Railway Company operates its line along Boston Road under a franchise granted by the Legislature and constituting part of chapter 892, Laws of 1867. This franchise was granted to the predecessor company, the Harlem Bridge, Morrisania and Fordham Railway Company, for constructing tracks along Boston road "to the village of West Farms." The franchise did not designate any street or define an exact point as the terminal of the route, nor did it expressly provide for sidings or car-stands. West Farms was never an incorporated village and therefore had no official boundary lines, but by "West Farms" the Legislature probably meant the intersection of Boston road and what is now Walker avenue. A later franchise was granted by the common

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council of the city of New York to the Union Railway Company, on August 23, 1892, for a route on Tremont avenue intersecting Boston road at West Farms, and this franchise provided for the construction of the route and also authorized the company to construct "such switches, sidings, turnouts, turntables and suitable stands as may be convenient for operation of said extensions or branches." It seems, however, that the Union Railway Company did construct the tracks between One Hundred and Seventy-seventh street and a point between One Hundred and Seventy-eighth and One Hundred and Seventy-ninth streets, and has been using the track as a switch for turning back Boston Road-West Farms line cars. Whether the company constructed these tracks under a claim that they were authorized by the right to construct "to the village of West Farms" or by the right to construct switches, sidings, stands, etc., is not shown. The New York City Interborough Railway Company has been using the constructed portion of the track and constructed its own tracks beyond that to One Hundred and Eightieth street. However, there does not appear to be a clear franchise right in the Union Railway Company to operate over the tracks north of One Hundred and Seventy-seventh street for car service.

The petitioners amended their petition so as to ask for the extension only to East One Hundred and Eightieth street. But whatever rights the Union Railway Company may have in the track constructed by it, they do not extend beyond a point between One Hundred and Seventy-eighth and One Hundred and Seventy-ninth streets. As has been pointed out, two street car lines are already operated over tracks between One Hundred and Seventy-seventh and One Hundred and Eightieth streets. It would be impracticable from an operating standpoint to switch back Boston Road cars between One Hundred and Seventy-eighth and One Hundred and Seventy-ninth streets as a regular practice at all times of the day, and the extension of the service for this short distance only would not materially further the petitioners' object. The Commissions' power in this matter, in any event, is limited to requiring the operation of cars to a point between One Hundred

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and Seventy-eighth and One Hundred and Seventy-ninth streets. Considering the fact that the company's transfer arrangements with the New York City Interborough Railway Company afford as good, if not better, service for this block and a half as would be afforded by operating its own cars, the Commission is not warranted in making an order for the extension of the service to One Hundred and Seventy-eighth and One Hundred and Seventy-ninth streets.

The complainants have also asked that, if the Commission should not order the entire extension to East One Hundred and Eighty-first street, it make a recommendation that the Union Railway Company apply to the board of estimate and apportionment for the necessary franchise rights for such entire extension. The testimony shows that it would undoubtedly be a substantial advantage to operate this line to East One Hundred and Eighty-first street. The company contends that the operation of an additional line between One Hundred and Seventy-seventh and One Hundred and Eightieth streets would seriously interfere with the operation of the other two lines between those streets and would affect the service beyond. Any additional transportation facility is highly desirable. If the Union Railway Company possessed the necessary franchise rights at the present time, the Commission would not hesitate to determine the company's obligation; but, in the absence of a franchise granted by the municipal authorities to the railway company, the determination of the matter is, in the present state of the law, one for the judgment of the company's directors.

The complaint must, therefore, be dismissed and, as the proceeding is on motion of the Commission, an order will be adopted discontinuing the proceeding.

Straus, Chairman, Hodge, Whitney and Hervey, Commissioners, concurring.

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In the Matter of the EXTENSION OF FOOTWALK ON TRESTLE ACROSS JAMAICA BAY, by The Long Island Railroad Company and The New York and Rockaway Beach Railway Company on the Rockaway Beach Division

Case No. 1858

(Public Service Commission, First District, September 28, 1916)

**Railroad corporations—ways and structures—gradual extension of footwalk approved.**

Where a trestle may be safely crossed by walking the ties and a footwalk is in course of construction from each end of the trestle the whole length of the footwalk need not be immediately constructed and gradual extension of the same at a reasonable rate is approved.

On January 12, 1915, the Commission entered an order in Case No. 1858, directing the Long Island Railroad Company and the New York and Rockaway Beach Railway Company to construct a footwalk between the eastbound and westbound tracks on the following stretches of trestle on the Rockaway Beach Division across Jamaica bay:

(1) Beginning at what is known as Howards at the north end of the trestle and extending south for a distance of one-half mile.

(2) Beginning on the north side of the Beach Channel Drawbridge near Hammels and extending northerly for a distance of one-half mile.

The companies accepted the order and submitted plans for the construction of the footwalk, which were approved by the Commission by a resolution adopted March 2, 1915.

Upon the construction of the required portions of the footwalk the advisability of extending it to cover the whole length of the trestle, about four miles, was taken up with the companies, and it was agreed by the Long Island Railroad Company in a letter to Commissioner Hodge, dated September 19, 1916, "to add during the fall or early spring an additional three-quarters of a mile—

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three-eighths of a mile at each end." Whereupon the following opinion of Commissioner Hodge was adopted:

HODGE, Commissioner.— This matter having been brought up by complaint of the Ridgewood board of trade under date of June fifth, and having been reported on by the electrical engineer under date of June twenty-sixth, was referred to me by the committee of the whole on July twenty-sixth.

I have examined this trestle and find that under order of the Commission dated January 12, 1915 (Case No. 1858) the railroad company has laid a plank foot-walk for about one half mile at each end of this trestle, and there seems to have been a general understanding on the railroad's part that they would add to this foot-walk from time to time until they eventually had a continuous walk from one shore to the other.

While the foot-walk would be convenient to passengers in case a train was stalled on the trestle, yet I am of the opinion that passengers could safely walk the ties, and I therefore do not think that the immediate completion of this foot-walk is urgently necessary.

However, I am of the opinion that it would be wise to gradually extend this foot-walk, and have taken the matter up with the railroad company, and they, in a letter of September nineteenth, have suggested that during the fall of 1916 and the early spring of 1917, they add an additional three-quarters of a mile; being three-eighths of a mile at each end adjoining the portion now in place.

I would recommend that this suggestion be accepted for the present, and that the case be kept open for further additions as may appear to be desirable.

Hayward, Whitney and Hervey, Commissioners, concurring;  
Straus, Chairman, absent.

# PUBLIC SERVICE COMMISSION

## SECOND DISTRICT

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In the Matter of the Complaint of PHILIP W. SCHELL, CHARLES W. SCHELL, AMASA J. BOYCE, THURLOW WEED BARNES, 2D; LOCUST FARMS COMPANY and Others, against ALBANY SOUTHERN RAILROAD COMPANY and THE NEW YORK CENTRAL RAILROAD COMPANY; as to Rates and Service on Milk and Cream to New York City

Case No. 5539

(Public Service Commission, Second District, June 7, 1916)

**Freight tariffs on fluid milk or buttermilk over Albany Southern Railroad Company for New York city.**

Upon the complaint being served on the railroad companies they answered and subsequently reviewed the question of rates with Mr. Martin Decker, attorney for the petitioner, and agreed upon a stipulation as to rates.

BY THE COMMISSION.—This complaint having been served on the railroad companies and answers received; and it being stated in the Albany Southern Railroad Company answer that —

“After reviewing the above case with Mr. Martin Decker, attorney for petitioners, we have decided that we will at once make effective a rate on fluid milk or butter milk in forty-quart cans, less carload, per can thirty-one and five-tenths cents; carload, twenty-eight and four-tenths cents per can.

“In twelve-quart cases, less carload, thirteen and two-tenths cents; carload, eleven and nine-tenths cents per case to New York, on which rate the Albany Southern Railroad will receive twenty-five per cent of the through rate to New York. This rate will apply on shipments made every day in the week including Sundays. The rate will be effective as an experimental rate for the period of six (6) months on and after July 1, 1916.

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"We do this in order to encourage the milk industry adjacent to the Albany Southern territory and for the benefit of the milk producers.

"If after this six (6) months period, the income from the milk traffic does not equal the expense of carrying on same, we will then file a new rate subject to the approval of the Public Service Commission of the Second District of the State of New York;" and Martin S. Decker for complainants and the Albany Southern Railroad Company by James E. Hewes, General Manager, having filed with the Commission a stipulation as follows:

"Complainants and Respondent, Albany Southern Railroad Company, hereby stipulate that upon the taking effect of a new milk and cream tariff from Albany Southern stations to New York city showing either joint or proportional rates and naming joint or proportional rates no higher than those now in force for milk and cream in cans and bottles in cases from Castleton and other stations on the Hudson River division of the New York Central Railroad to New York city, that this proceeding may be closed upon the records of this Commission, with the right in any party to a reopening of the proceeding after six months from the effective date of said new tariff, the rates named in said new tariff to remain in force however until the disposition of this proceeding upon such reopening;" and it appearing that it is not necessary that the New York Central Railroad Company join in this stipulation; it is,

Ordered, That this case is hereby closed on the records of this Commission on the conditions stated in the stipulation hereinabove quoted.



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Public Service Commission, Second District

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**In the Matter of the PROPOSED NEW PASSENGER FARES ON THE  
NEW YORK CENTRAL RAILROAD****Case No. 5345****(Public Service Commission, Second District, June 8, 1916)****Proposed uniform passenger rates suspended pending investigation.****Contention that the intrastate passenger business of the company did not yield a proper return.****Intrastate passenger revenue as related to similar expenses.****How a reasonable intrastate passenger rate should be arrived at.****Decrease of the average rate of passenger per mile.****Operating expenses — how apportioned between passenger and freight service.****Operating expenses — how apportioned between interstate and intrastate traffic.****Operating expenses — how apportioned in case of intrastate passenger traffic as between arbitrary divisions, some of which are unprofitable.****The equalization of rates on all carriers — when justified.****Statutory limitation upon passenger fares between New York and Albany.****Proposed tariffs canceled as unjustified.****Operation of "belt line" between Albany and Troy.**

The New York Central Railroad Company filed with the Commission, to take effect January 1, 1916, certain tariffs having the effect of establishing a substantially uniform passenger rate of two and a half cents per mile throughout the State except for way passengers between Albany and Buffalo, where the statute of 1853 fixed the fare at two cents per mile. These new tariffs generally operated to increase the existing rates, in a few instances to decrease them. New round-trip rates were also fixed, based on the one-way rate of two and a half cents per mile. Complaints having been made to the Commission, the new tariffs were suspended and investigation undertaken.

In this case there was no contention that the company failed to earn a fair return on its investment as a whole, but only that its intrastate passenger business did not yield a proper proportionate return. Five Per Cent Rate Case, 31 I. C. C. 351; Western Rate Advance Case, 35 id. 497; Norfolk & Western Ry. Co. v. Conley, 236 U. S. 604; Northern Pacific Ry. Co. v. North Dakota, 236 id. 585, distinguished on this ground.

No valuation of the company's property was submitted by the company or attempted by the Commission, the company presenting the case upon the theory that its intrastate passenger revenue was less than its intrastate passenger expenses.

To ascertain a reasonable intrastate passenger rate the entire passenger traffic, interstate as well as intrastate, should be considered. It was

found that the earnings from interstate passenger business had been approximately 50 per cent of those from intrastate passengers.

It was found that while the passenger business of the company has been gradually increasing the average rate per passenger per mile has been decreasing, because of a pronounced increase in commutation passengers at commutation rates not affected by the proposed tariffs.

In apportioning operating expenses between passenger and freight service, the railroad pursued the method adopted by the Interstate Commerce Commission in the Western Passenger Rate case, and the Commission accepted that method as sufficient for the present case.

In apportioning operating expenses between interstate and intrastate traffic the Commission refused to base the apportionment on the ratio between intrastate passengers and interstate passengers (6.4 per cent interstate), but apportioned such costs upon the ratio between intrastate and interstate passenger miles. (In 1910, 29.9 per cent interstate and in 1915, 31.3 per cent interstate.) Apportioning passenger operating expenses by the method set forth in the opinion, it was found that the company is earning a fair return on its entire intrastate passenger traffic, but that it is probably not earning a fair return on its intrastate passenger traffic on any of the divisions affected by the tariffs in question except the Hudson division from Albany to New York and perhaps the Harlem division.

Where a large railroad system is made up of many underlying companies formerly operated independently and the system is now split into divisions, some of which are unprofitable, the divisions which are profitable cannot be made to bear the cost of transporting passengers on the unprofitable divisions to the full extent of such losses. Emmet, Commissioner, dissenting.

The Commission cannot approve increased fares merely for the purpose of making the rates of all carriers equal. To justify approval of such increases there must be established the necessity of additional revenue in order to earn a fair return. Emmet, Commissioner, dissenting.

Chapter 216 of the Laws of 1846, incorporating the Hudson River Railroad Company and limiting passenger fares between New York and Albany to two cents a mile, except in winter months, while not expressly repealed, was repealed by implication by the General Railroad Act of 1850. Johnson v. Hudson R. R. Co., 49 N. Y. 455.

While the New York Central Railroad Company clearly failed to show that the proposed increases on its Hudson division were justified, and while it seems that some increases on certain other divisions might be justified, all the proposed tariffs were ordered canceled in order that the company might work out new tariffs consistent with the conclusions reached and eliminating certain discriminations discovered in the course of the investigation. Emmet, Commissioner, dissenting.

Among the tariffs under suspension were tariffs filed by the Delaware and Hudson Company and the New York Central Railroad Company for passenger service between the cities of Albany and Troy, fixing a rate of

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fifteen cents instead of ten cents, the existing rate. These companies operate jointly a "belt line" service between the two cities, the New York Central Railroad Company owning the tracks on the east side of the Hudson river and the Delaware and Hudson Company those on the west side. While it was apparent that the cost per train-mile of operating the belt line trains is more than the revenue per train-mile derived therefrom, there was no evidence as to the revenues and expenses of other traffic over the same tracks, and in the absence of such evidence it was held that the railroads had failed to sustain the burden of showing the justness of the proposed increase.

C. C. Paulding, Jacob Aronson, and Visscher, Whalen & Austin (by Mr. Austin), for the New York Central Railroad Company.

John E. MacLean and H. T. Newcomb, for the Delaware and Hudson Company.

M. B. Pierce, for Erie Railroad Company.

Stewart C. Pratt, for Lehigh Valley Railroad Company.

C. L. Andrus, for New York, Ontario and Western Railway Company.

H. G. Curtis, for Hudson Navigation Company.

Samuel Untermeyer, for complainants.

Louis Marshall, for Mayors' Conference.

Benjamin Fagan, for village of Ossining.

John B. Corwin, for city of Newburgh.

Samuel J. Rosensohn, representing John P. Mitchel, Mayor of the city of New York.

Palmer Canfield, Jr., representing the Mayor of Kingston.

Walter E. Ward, for the Civic League of Albany.

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Joseph B. Mulholland, for Alice M. Brady and others.

Julius Illch, for the Albany Chamber of Commerce.

L. D. C. Woodward, for the Watervliet Chamber of Commerce.

Nathaniel B. Spalding, for the New York State Tax and Transportation Reform Association.

R. A. DeFreest, for Albany Council Commercial Travelers.

Albert E. Davis, for United Commercial Travelers of America.

M. W. Van Auken, for Commercial Travelers Mutual Accident Association of America.

George R. Lunn, for City of Schenectady.

Homer Eckerson, Mayor of Mechanicville in person.

Thomas J. Shuman, for Village of Haverstraw.

F. E. Moyer, for City of Johnstown.

Eben H. P. Squire, for City of White Plains.

William E. Fitzsimmons, for special committee Albany Chamber of Commerce.

Cornelius F. Burns, Mayor of City of Troy in person.

W. W. Teeling, for Rensselaer Board of Trade.

C. S. Davison, for Village of Tarrytown.

James T. Lennon, Mayor of Yonkers in person.

Joseph F. O'Brien, representing Mayor James T. Lennon of Yonkers.

Max Cohen, Frank A. Bennett, and Joseph S. Wood, for Cities of Mount Vernon and Yonkers.

Frank H. Deal, for Village of Green Island.

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Public Service Commission, Second District

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CARR, Commissioner.— This is a case involving increases in fare on certain lines of the New York Central Railroad Company in the State of New York. These proposed increases were set forth in twenty-nine tariffs and supplements which were filed with the Commission to take effect January 1, 1916, on statutory notice. Immediately after these tariffs were filed, numerous complaints were filed with the Commission protesting against the increase. It was thought by the Commission that the more satisfactory way of dealing with the matter would be for it to institute an investigation on its own behalf, and it acted accordingly. It was considered that under this method all the complainants would have ample opportunity to be heard. The first hearing was held in the city of Albany on February 15, 1916, and after five more hearings the case was closed April 21, 1916. Pending the investigation, the tariffs were suspended until April 29, 1916; on April 25, 1916, they were suspended until June 1, 1916; and on May 25, 1916, they were again suspended to July 1, 1916. Some of the tariffs which are the subject of this investigation were also filed with the Interstate Commerce Commission but they were not suspended by that body. Practically all of the trunk lines operating in the State of New York east of Buffalo filed tariffs with the Interstate Commerce Commission at the same time.

In 1914 there were ten operating divisions of the New York Central and Hudson River railroad, as follows: Western division, Buffalo to Syracuse; Mohawk division, Syracuse to Albany; Hudson division, Albany to New York; Harlem division, New York to Chatham; Putnam division, New York, One Hundred and Fifty-fifth street to Brewster; River division, Weehawken to Ravena; Pennsylvania division, Williamsport to Lyons; Ontario and St. Lawrence division, Syracuse to Massena Springs and Syracuse to Suspension Bridge; Adirondack division, Utica to Malone; Rochester division, Rochester to Buffalo and Niagara Falls (part of the Rome, Watertown and Ogdensburg).

Single fares on various divisions are as follows: Western division, two cents per mile; Mohawk division, two cents per

mile; Hudson division, outside of New York city, two and seventeen one-hundredths cents per mile; Harlem division, outside of New York city, two to two and one-half cents per mile; Putnam division, from two cents to three cents per mile (these variations are due in some cases to trolley competition); River division, from two and seventeen one-hundredths cents to three cents per mile; Pennsylvania division, south of Corning, two and one-half cents per mile; Pennsylvania division, north of Corning, two cents per mile; Ontario and St. Lawrence division, uniformly two and one-half cents per mile except between Wallington and Suspension Bridge where they are two cents per mile, and between Syracuse and Suspension Bridge two cents per mile; St. Lawrence and Adirondack division, two and one-half cents per mile; Rochester division, two cents per mile; Batavia and Canandaigua branch, two and one-half cents per mile; Batavia and North Tonawanda branch, two and one-fourth cents per mile.

The fare for way passengers on the main line of the New York Central railroad between Albany and Buffalo was fixed at two cents per mile by the provisions of chapter 76 of the Laws of 1853, pursuant to which the corporation was created.

Fares on the Hudson division and the River division were increased in 1909 from two to two and seventeen one-hundredths cents per mile. Some increases in commutation and family tickets were made in 1907 and 1910.

The increases in rates in the tariffs under suspension cover one-way and round-trip tickets; no other fares are affected. The principal changes are on the Hudson, Harlem, and River divisions, covering practically the territory south of Albany, and such territory beyond that as would be affected by a fare to that territory. These tariffs also provide for some decreases in existing rates. The effect of the proposed change in the one-way rate is to make the fare substantially uniform throughout the State at two and one-half cents per mile except where the fare for way passengers has been fixed at two cents per mile by statute. The maximum decrease anywhere on the system is half a cent a mile: this would occur where a rate of three cents was in effect at the time this application was made. In some cases two and three-fourths cents

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per mile is charged, and that would be reduced to two and one-half cents. The round-trip fares in the commutation territory, which is a forty-mile zone out of New York city, were left undisturbed at two cents a mile. The limits of that commutation zone are Peekskill on the Hudson division, Katonah on the Harlem division, Yorktown Heights on the Putnam division, and Jones Point on the West Shore. The round-trip fares beyond that forty-mile zone are constructed on the basis of two and one-half cents per mile, and fares from and to points within that zone, outside of the forty-mile limit, are constructed on the basis of the fare in effect within the forty-mile zone and two and one-half cents per mile beyond.

The Lackawanna, Lehigh Valley, and Erie construct their single fares on the two and one-half cents per mile basis, and the Delaware and Hudson Company on a three-cent per mile basis. The basis generally in Pennsylvania and New England territory is two and one-half cents per mile. At the time of the filing of the new tariffs by the New York Central, its fares in the State of New York averaged about two and two-tenths cents per mile.

The interstate fares now in effect over all the lines in the State of New York are on a basis of approximately two and one-half cents per mile, pursuant to tariffs which have been filed, so that the interstate rate on the New York Central in the State is higher than the intrastate rate. As a result, the Central is carrying passengers in the State of New York for less than other roads competing with it at certain points in the State, due to the fact that their passengers are interstate passengers while those on the Central are intrastate. This situation, however, has only existed since January 1, 1916, when the tariffs filed with the Interstate Commerce Commission became effective. On the other hand, however, some of these roads, even with increased fares and greater mileage to points competing with the Central, are carrying passengers from New York city to these points at a lower rate per mile than the Central. There has been no apparent increase in the passenger business on the Central due to the interstate rate charged by the competing roads, nor has any increase in its service been required because of the fact that its intrastate rates to competing

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points are less than the interstate rates charged by the other carriers.

The one-way fare of nine dollars and twenty-five cents from New York to Buffalo is not disturbed under the proposed increases. The differential fare is eight dollars. This applies to the Lackawanna, West Shore, Lehigh Valley, and the Erie. The differential rate is not affected in any case on any of the lines. This differential is the advantage given to the so-called weaker lines from a traffic standpoint so they may get an equitable share of the business.

In 1910 the total mileage of the lines east of Buffalo, which includes the Pennsylvania division, the St. Lawrence and Adirondack, and the Ottawa and New York, was 3,268.72 miles; and the lines exclusively in New York State other than the Boston and Albany, St. Lawrence and Adirondack, and Ottawa and New York, aggregated 2,603.45 miles. The Pennsylvania division outside of the State of New York comprises about 600 miles. The total miles of the Central in the State in the year 1914 was 2,643.92.

The total operating revenue from passenger service from the lines east of Buffalo includes revenue from the Pennsylvania division and that portion of the River division in New Jersey. The total operating revenue from intrastate passengers in New York does not include the revenue from the lines in Pennsylvania and New Jersey.

The population per mile of road in New York and adjacent States is as follows: New York, 1,141; Connecticut, 1,181; New Jersey, 1,190; Massachusetts, 1,666; Rhode Island, 2,847; Pennsylvania, 705. Density of traffic is an important consideration in passenger traffic so far as earnings are concerned.

The report of the New York Central and Hudson River Railroad Company to the Public Service Commission, Second District, for the year ended June 30, 1914, gave the average number of passengers per mile as seventy-four. Mr. Vosburgh, the general passenger agent of the New York Central, testified on behalf of the railroad that his records showed seventeen passenger-miles per car-mile.



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The following schedule shows the number of trains operated on the lines east of Buffalo in the last six years:

	1910	1911	1912	1913	1914	1915
Local .....	896	885	880	928	858	875
Through .....	136	133	135	136	130	120

On the Hudson division, a train from New York to a point beyond Albany is classed as a through train. On the Harlem division, a through train is one from New York to a point beyond Chatham. On the River division, a through train is one from New York to a point beyond Ravena. Eastbound trains are figured on the same basis.

Orleans county is the only county in the State of New York served exclusively by the New York Central railroad.

The following cities in the State of New York are served by railroads other than the New York Central, as follows: Buffalo ten, Rochester four, Syracuse three, Albany one, New York city eleven.

The following figures give some idea of the traffic on other roads out of New York city:

New York city to	Number of miles	Passengers per month	Single trip per mile	Round trip per mile
Philadelphia, Penn. ....	90	100, 000	\$.025	\$.025
Boston, Mass. ....	230	81, 000	.025	.....
New Haven, Conn. ....	73	39, 000	.025	.....
Springfield, Mass. ....	135	12, 000	.025	.....
Albany, N. Y. <sup>1</sup> .....	143	13, 500	.0217	.02

The service performed by the New York Central upon its lines is substantially the same and equally as good as that given by other lines which operate out of New York city and which were used in comparing fares on those lines with fares on the New York Central.

There are only two trains on the New York Central that handle interstate passengers exclusively: these are the Twentieth Century Limited east and westbound trains. The average number of

<sup>1</sup> This does not take into account tickets for points west or north of Albany, nor inter-state tickets, nor passengers using mileage books between New York and Albany.

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passengers on the Twentieth Century is about seventy-four per day.

The trains that run in sections are usually long distance trains like the Twentieth Century, Lake Shore Limited, and the Wolverine. These are heavy Pullman trains. Some of the trains on the Hudson division occasionally run in sections, particularly during the summer season.

No portion of the interline tickets is apportioned to intrastate business. The interline tickets are those sold for transportation from a point within the State to a point without the State, and *vice versa*. The account is kept in that way for taxation purposes because the earnings of the company within the State are taxed.

The interstate traffic uses the 2,600 miles of track in New York east of Buffalo.

The earnings on various eastern railroads per passenger-train mile for the year ended June 30, 1914, were as follows:

Lake Shore and Michigan Southern.....	\$1 77
Pennsylvania .....	1 60
Pennsylvania Company .....	1 39
Erie .....	1 35
Lehigh Valley .....	1 15
Central Railroad of New Jersey.....	1 29
Delaware and Hudson.....	1 28
Long Island .....	1 60
New York, Chicago and St. Louis.....	1 54
Buffalo, Rochester and Pittsburgh.....	97
New York, Ontario and Western.....	1 11

These figures are taken from the report published by the Interstate Commerce Commission.

The accounts of the consolidated company, the New York Central Railroad Company, began January 1, 1915. Since that time the accounts have not been kept by State lines. The accounts of the New York Central and the constituent companies have never been kept by State lines because this was not required by the Interstate Commerce Commission.

The revenues reported to the Public Service Commission by

## Public Service Commission, Second District

the New York Central Railroad Company for the year 1915 for freight and passenger traffic are as follows:

1915	Total operating revenue	Operating expense	Net
First quarter .....	\$39,012,342	\$29,794,426	\$9,217,916
Second quarter .....	44,660,147	28,725,146	15,935,001
Third quarter .....	48,304,589	29,820,979	18,483,610
Fourth quarter .....	52,953,405	32,538,906	20,414,499
	<u>\$184,930,483</u>	<u>\$120,879,457</u>	<u>\$64,051,026</u>

1915	Total revenue including non-op. rev.	Operating expense inc. fix. chgs.	Net income
First quarter .....	\$42,871,035	\$43,072,098	\$201,063
Second quarter .....	49,166,910	42,153,792	7,013,118
Third quarter .....	52,402,182	43,407,226	8,994,956
Fourth quarter .....	57,278,358	45,373,895	11,904,463
	<u>\$201,718,485</u>	<u>\$174,007,011</u>	<u>\$28,113,600</u>

The 1915 net income which remained after paying all fixed charges, taxes, etc., was equal to 11.11 per cent upon the outstanding stock of the New York Central Railroad Company, amounting to \$249,590,460. The earnings during the last quarter of 1915 were equal to about 4.6 per cent upon the stock of the company. Dividends have been paid on the stock of the New York Central and Hudson River Railroad Company since 1875, as follows:

	Per cent		Per cent
1876-1884 .....	8	1899 .....	4½
1885 .....	5	1900-1905 .....	5
1886-1888 .....	4	1906 .....	5½
1889-1890 .....	4½	1907 .....	6
1891-1893 .....	5	1908-1909 .....	5
1894 .....	4½	1910 .....	6
1895-1898 .....	4	1911-1913 .....	5
		1914 .....	5

Counsel for the railroad company at the first hearing made the following statement in opening his case:

"This investigation, if the Commission please, is into the proposed increase by the New York Central and other railroad com-

panies of their single-trip rates and round-trip rates in certain territory in the State of New York. The New York Central, of course, as being the largest road in the State and having the largest interest, will, I assume, be expected to bear the brunt of the matter.

"We have not proposed, in the preparation of our case, and we do not propose in the presentation of it, to go into the question of valuation or of interest charges or fixed charges of any character. We simply intend to confine ourselves to the intrastate passenger revenues and the intrastate passenger expenses and the value of the service. To that end we will present our testimony, and we hope to be finished very shortly. Our reason for not going into the valuation question is, first, that it would be embarrassing at this time when the Interstate Commerce Commission is conducting a valuation of all the railroads of the country; and second, that it is unnecessary, as our intrastate passenger revenue is less than our intrastate costs and of course it follows that if we are entitled to a reasonable return upon our investment and we do not obtain from the service enough of a return to pay the expenses then it is unnecessary to go into the return on the investment."

From our point of view the question involved here is one of fact and not of law, and we have so dealt with it. It might well be that we could properly decide the case on the earnings of the road for 1915 alone, since they so conclusively show that the company is earning a substantial return, at least upon its outstanding securities if not on the actual value of the property. However, in order that we may present the matter more at length we have concluded to discuss the facts in some detail as we think this is due the interested parties. For the reason here stated, we shall not attempt to deal with the numerous legal propositions which are discussed at considerable length in the briefs submitted by counsel.

The complainants strenuously opposed the action of the railroad in determining its operating costs by the same method as that adopted by the Interstate Commerce Commission in the Western Passenger Rate case, but the brief of counsel accepts the percentages used by Witness Gardner for the railroad in making his computations so it will be unnecessary to discuss other theories

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as to the operating expenses which were presented by counsel at the various hearings.

The case has presented considerable difficulty to the Commission for the reason that evidence was prepared and submitted on the theory that no valuation of the property was required in order to reach a determination as to whether or not the company was entitled to increase its fares in the manner set forth in the tariffs which are under suspension. It is undoubtedly true that many cases may be presented which on their face indicate that an increase would be justified, yet it has come to be a well accepted theory that in order to determine what are fair and reasonable rates the regulating body must be in possession of facts so that it can determine whether or not the company is earning a fair return upon the value of the property used in the public service. No valuation was furnished in this case for the reasons heretofore mentioned, so that the Commission is obliged to deal with the situation entirely upon the record as it stands. Whether our determination would be any different if we knew the value of the company's property it is impossible for us to state.

The railroad company proceeded upon the theory that it was only necessary to show that the earnings from intrastate fares were not sufficient to pay operating expenses, giving no consideration to the question of interstate passengers carried in the State of New York. In the course of the investigation, however, it developed that the earnings in the State of New York from interstate passengers were approximately 50 per cent of those for intrastate passengers, and that these interstate passengers traveled over some portion of the road from New York city to Buffalo. How many of them traveled this entire distance we are not advised, but it is a well known fact that every person traveling over the New York Central railroad from New York city to points outside of the State of New York west of Buffalo passes over the main line of the New York Central from New York city to Buffalo, a distance of 440 miles. To say that this traffic is not to be taken into consideration in determining what is a reasonable rate of fare in the State of New York is a conclusion which this Commission is unable to accept.

Objection was made by counsel for the railroad company to furnishing figures showing interstate revenue which was earned on the lines east of Buffalo, but they were supplied at the request of the Commission.

We believe that all passenger traffic over the lines of the company in the State of New York should be taken into consideration in determining the rate per mile to be charged to passengers.

Following a suggestion in the Western Passenger Rate case, the New York Central endeavored to segregate its intrastate costs from the interstate costs, but this in our opinion would not enable us to work out the matter satisfactorily. It was determined by the Interstate Commerce Commission in the case mentioned that the interstate and intrastate passenger business of the carriers was so intermingled that the matter could be more satisfactorily dealt with as a whole, and we have come to the same conclusion here.

It should be borne in mind that all of the figures that were presented to the Commission relating to interstate as well as intrastate revenue in the State of New York were made upon the basis of the existing fares in the State: and that these fares on the main line from New York to Buffalo are at the rate of two and seventeen one-hundredths cents per mile from New York to Albany, a distance of 143 miles; and two cents per mile from Albany to Buffalo, a distance of 297 miles.

We are here confronted with a situation which is entirely different from the one out of which the Western Passenger Rate case developed. That case was one which related to fare increases made by certain western roads following the determinations of the Interstate Commerce Commission in the Five Per Cent Rate Case, 31 I. C. C. 351; and the 1915 Western Rate Advance Case, 35 id. 497; and recent decisions of the Supreme Court of the United States. There the carriers were claiming that their earnings from freight and passenger business were insufficient to give them a fair return on their investment. There is no such situation before this Commission, for it is not claimed that the New York Central Railroad Company is failing to earn a fair return on its investment as a whole, but rather that it is entitled to higher rates on its intrastate passenger business because that business is

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not earning a fair return taken as a whole. As a matter of fact, the evidence here is to the effect that the road, after paying all its fixed charges, including taxes and rentals, earned 11.11 per cent on its capital stock for the year 1915.

The railroad urges the proposed increases not so much from the revenue standpoint as it does on the ground of being permitted to equalize its rates so they will correspond with the rates now exacted by other carriers which reach points in the State of New York in competition with the New York Central. To substantiate this, we quote the following paragraph from page 16 of the brief submitted by the counsel for the railroad company:

“While we do not, of course, urge the disparity between passenger rates on the New York Central and those on the other trunk lines as conclusive of the proposition that the rates of the New York Central are too low, we do submit that the difference, in some cases decidedly substantial, between the rates on the other lines and those on the New York Central should be recognized by the Commission as of persuasive evidence tending to the conclusion that the New York Central should be permitted to equalize its rates to the extent now sought, namely to a 2½ cent basis.”

In support of this claim the brief quotes from *L. & N. R. R. Co. v. U. S.*, 238 U. S. 1, and the accompanying figures (Table I) were read into the record to show the disparity between the fares charged on the New York Central and the other roads running out of New York city.

We do not understand that it is our province to approve increased fares merely for the purpose of making the rates of all carriers equal or substantially uniform even. To justify approval of the proposed increases there must be established the necessity for additional revenue in order to enable the company to earn a fair return upon its investment.

We are not unmindful of the decisions of the Interstate Commerce Commission nor of the reasoning set forth in *Norfolk & Western Ry. Co. v. Conley*, 236 U. S. 604, and *Northern Pacific Ry. Co. v. North Dakota*, 236 id. 585. These cases can readily be distinguished from the present one because they rest upon an entirely different foundation. In each of them a State attempted to fix rates which the companies claimed prevented them from

earning a fair return upon their investment and that the rates were in effect confiscatory; while in the Western Passenger Rate case the claim was made that taking the returns from both freight and passenger traffic combined, the companies were not earning a fair return on their investment, and for that reason additional increases in passenger fares were justified. Here we are met with a situation where the only real contention for the increased rates is the claim that the Interstate Commerce Commission and the United States Supreme Court have decided that each class of service should stand by itself, and therefore, inasmuch as the passenger business is not earning as large a return as the freight business, the passenger fares ought to be increased.

We do not understand that such an argument is supported by either the decisions of the Interstate Commerce Commission or those of the courts. If there are such decisions, our attention has not been called to them.

It goes without saying that neither class of traffic should be unduly burdened for the benefit of the other. It is not our view that in a situation like the present one, where a great railroad system in a State is made up of many underlying companies which were formerly operated independently, and said system is now split up into divisions, some of which are unable to earn their operating expenses, the divisions which are profitable must be made to bear the cost of transporting passengers on the unprofitable divisions to the full extent of such losses. Such a determination would in our opinion not only be unwise but it would be unreasonable and unjust to that portion of the traveling public which furnishes the traffic for the profitable division. This, however, is not in harmony with the views of the counsel for the railroad, who stated that the passenger traffic must be regarded as a whole; that if the income from intrastate traffic is not enough to pay the expenses of that traffic as a whole the income must be treated as a whole, and if there is to be any increase in rates it must be upon the whole business; that the general condition is the one that should be dealt with leaving out any particular local conditions.

The following is an extract from New York Central Exhibit No. 4:



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## NEW YORK CENTRAL RAILROAD

Statement showing passenger business on lines east of Buffalo in New York State, excluding Boston and Albany, St. Lawrence and Adirondack, and Otsego and New York

Years 1910-1914 inclusive are N. Y. C. & H. R. R. E., and 1915 is an estimate for N. Y. C. R. R. based on percentages of previous years. (Applicant's Exhibit No. 4.)

	1910	1911	1912	1913	1914	1915
<b>Passengers</b>						
Interline.....	2,353,490	2,347,643	2,352,806	2,555,255	2,299,482	1,839,441
Local.....	24,702,809	25,090,988	25,835,450	26,842,162	25,477,116	24,076,134
Commutation.....	8,818,459	9,129,987	9,911,274	10,792,014	11,104,938	11,520,956
<b>Total.....</b>	<b>35,874,758</b>	<b>36,568,618</b>	<b>38,099,530</b>	<b>40,189,431</b>	<b>38,881,536</b>	<b>37,435,531</b>
<b>Miles</b>	<b>1,372,995,106</b>	<b>1,388,405,145</b>	<b>1,451,173,172</b>	<b>1,559,558,703</b>	<b>1,445,665,202</b>	<b>1,396,117,043</b>
Passenger revenue, intrastate.....	\$15,513,038 53	\$15,836,006 01	\$16,050,913 15	\$17,001,026 19	\$15,744,493 97	\$16,381,828 47
Passenger revenue, interstate.....	8,813,659 24	8,848,587 71	9,734,076 97	10,784,321 80	10,183,731 48	9,403,729 17
<b>Total passenger revenue (Acct. 2 for 1910-1913):</b>	<b>\$24,326,695 77</b>	<b>\$24,684,593 72</b>	<b>\$25,784,990 12</b>	<b>\$27,785,347 49</b>	<b>\$25,928,225 45</b>	<b>\$25,785,557 64</b>
(Acct. 102 for 1914-1915).....						
Average rate per passenger per mile, cents.....	1.772	1.778	1.777	1.782	1.794	1.847
Average amount received per passenger, cents.....	67.810	67.502	67.678	69.136	66.685	68.880
Average distance each passenger carried, miles.....	38.27	37.97	38.09	38.81	37.18	37.20

From this it will be seen that for the year ended December 31, 1915, the number of interstate and intrastate passengers carried in the State of New York was less than for any one of the previous five years, but that the number of commutation passengers has steadily increased every year: that the number of such passengers carried in 1915 was 30.6 per cent in excess of the number carried in 1910. The number of passenger-miles in 1915 was less than for any one of the five preceding years except the years 1910 and 1911, and the revenue from intrastate passengers was more than that for any one of the preceding five years except the year 1913, while the interstate revenue was less than that for the years 1912, 1913, and 1914; indicating, we believe, that when general business throughout this section of the country is depressed the interstate business falls off to a greater extent than the intrastate business. The total passenger revenue for 1915 was more than for any of the preceding years except 1913 and 1914. This tabulation also shows that the average rate per passenger per mile has increased each year notwithstanding the very severe business depression throughout the year 1914 and during the early part of the year 1915; that the amount received per passenger in 1915 was more than in any of the previous five years excepting 1913; and that the distance each passenger was carried in 1915 was less than in any of the previous five years excepting 1914.

The conclusion that we must necessarily draw from these figures is that the business of the company has been gradually increasing under normal business conditions; that its passenger-mile earnings are increasing, probably due to the fact that more passengers are riding per train, and that the pronounced increase in the number of commutation passengers with the correspondingly low rate for such service is tending to keep down the average rate per passenger per mile which would otherwise be very materially increased, because these commutation tickets are sold at a rate considerably below the average rate per passenger per mile in the year 1915. It should also be noted that the revenue for the six years in question includes nothing for mail, express, and excess baggage, and such other items as are ordinarily credited to passenger service revenue.

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The accompanying statement (Table II) is a summary made up from the New York Central Exhibit No. 8:

This sets forth very clearly the true facts with reference to the operation of the New York Central. The figures purport to show the earnings per passenger-train mile derived from both intrastate and interstate passengers in the State of New York east of Buffalo. It shows that the main line and branches which comprise the main trunk of the railroad from New York city to Buffalo earned an average of one dollar and eighty-eight cents per train-mile in 1915, which was in excess of similar earnings during any of the previous five years, and that such earnings had increased during each of those years; that the earnings on the Harlem division are increasing each year; and that the earnings on each of the other six divisions mentioned, except possibly the River division (West Shore), were probably less than the operating expenses per train-mile.

It also shows that 56.4 per cent of the total train-miles operated in the State of New York pertains to the main line and branches, which includes the Hudson River division on which the maximum fare is now two and seventeen one-hundredths cents per mile and which it is now proposed to increase to two and one-half cents per mile; and that the total passenger-train miles on all other divisions in the State is but 43.6 per cent of the total passenger-train miles in the State; also, that the main line and branches earn 71.1 per cent of the total passenger revenue of all the lines in the State east of Buffalo. The passenger earnings of the New York Central railroad per train-mile on the main line seem to be high as compared with other roads notwithstanding the maximum charge per mile on the main line between Albany and Buffalo is only two cents. In addition, it carries on its various lines many passengers who use different forms of reduced fare tickets at two cents per mile and less. These lower rates of course reduce the general average receipts per passenger-mile.

The only conclusion that we can draw from these figures is that the company is not deriving a sufficient return from divisions other than the main line and branches and possibly the Harlem division, and that properly any operating loss on passenger operations is

directly chargeable against the six divisions other than those just above referred to.

At this point it is proper to observe that the trains operated on the other divisions are in many respects different from those on the main line. Different equipment and motive power are used, fewer trains are operated, and the track structures are not as heavy; and it is probably true that the expenses per train-mile are less. The facts regarding them can all be readily brought out if any effort is made to justify increased rates on any of those divisions.

We are fully convinced that no injustice is done the New York Central Railroad Company in this case by taking the revenue from interstate passenger traffic on the lines east of Buffalo into consideration with the revenue from intrastate passenger traffic in the same territory, for we know from general observation over a period of years that the great bulk of the interstate passenger traffic in the State of New York is over the main line between New York city and Buffalo, on which route the fare is two cents per mile for a distance of 297 miles, and two and seventeen one-hundredths cents per mile for a distance of 143 miles. Assuming that 80 per cent of the interstate passenger traffic in the State is averaged over the main line: namely, that part between Albany and New York where the fare is two and seventeen one-hundredths cents per mile, and that part between Albany and Buffalo where the fare is two cents per mile, then the average fare for such interstate passengers would be two and six one-hundredths cents per mile. Assuming that the balance of the interstate passengers, to wit 20 per cent, averaged two and one-half cents per mile, then the average for all the interstate passengers carried on the line east of Buffalo in New York State would be two and one hundred and forty-eight one-thousandths cents per mile. Taking this figure to represent the amount received per mile for interstate passengers, we find that in 1910 the interstate mileage in the State of New York amounted to 410,319,332, which equals 29.9 per cent of the total passenger-miles in the State for that year. Likewise, if we apply the same theory to the year 1915, we find that the interstate passenger-miles in the State equalled 437,790,000, or 31.3 per cent of the total passenger-miles in the State.

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The witnesses for the New York Central read into the record various figures which had been prepared to show that the intra-state trains were being operated at a loss. A tabulation of these figures was used on the hearing, but the same was not read in evidence although it was doubtless intended that it should be. We therefore present it here, in accompanying Table III, inasmuch as most of the figures are in the case. It is necessary that they be presented in this form in order to explain more clearly our views regarding them.

It may be of interest to present with the foregoing figures and for consideration therewith the accompanying summary (Table IV) showing the separation of operating expenses which was introduced as Exhibit No. 1 by the railroad.

In determining the proportion of operating expenses which should be charged against interstate passengers it was assumed that the interstate traffic should bear 6.4 per cent of the total passenger operating expenses, because 6.4 per cent of the total passengers carried in the State were interstate passengers. For the reasons already stated, we believe it is not correct to determine the percentage of interstate expense in this way, when the percentage of interstate passenger-miles in 1910 was 29.9 per cent, and in 1915, 31.3 per cent of the total passenger-miles in the State. It is true that the record shows that it is cheaper for the New York Central to carry interstate passengers because of the fact that most of them travel in Pullman cars and that the Pullman equipment is furnished without expense to the New York Central. On the other hand, however, the Central is obliged to provide way and structures, terminals, switching, power equipment, and to incur a certain amount of transportation and traffic expense as well as general expenses on account of such passengers; so that even giving due credit for the saving made by carrying them in Pullman equipment, it would probably not make a very appreciable change in the operating cost per train-mile. It will be seen that a different situation is presented by basing the interstate expense on the interstate mileage in the State. In the foregoing tabulation the earnings include revenue from mail, express, and excess baggage in the State, and the operating expense covers this service as well

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as the expense applying strictly to passengers. This was necessary because of the difficulty of segregating the expenses chargeable to mail, express, and excess baggage. In determining the percentage of interstate passenger-miles in the State we have only taken into consideration the actual revenue from passengers alone.

The following table shows the expense per train-mile for intrastate trains for the years 1910 and 1915, which are obtained by allocating to interstate passenger service in the State 29.9 per cent and 31.3 per cent respectively of the total operating expenses.

	1910	1915
Total revenue intrastate.....	\$21,510,472 15	\$23,449,698 73
Total operating expense, Line East.....	21,899,503 44	22,131,948 03
Percentage of mileage in New York State	79.65%	79.74%
Operating expense in New York State...	17,442,954 48	17,648,005 35
Percentage of expense applicable to interstate passengers based on interstate passenger-miles .....	29.9%	31.3%
Operating expense applicable to interstate passengers based on foregoing percentages .....	5,214,443 38	5,523,825 67
Operating expenses applicable to intrastate passenger traffic .....	12,228,511 10	12,124,179 68
Total taxes chargeable to passenger traffic .....	1,464,619 38	1,882,844 26
Deduct taxes chargeable to interstate traffic based on foregoing percentages.	448,921 19	589,330 25
Taxes chargeable to intrastate traffic...	1,015,698 19	1,293,514 01
Interest charges applicable to passenger traffic .....	3,429,123 66	7,166,621 18
Deduct interest charges applicable to interstate traffic based on foregoing percentages .....	1,025,307 97	2,243,152 43
Interest charges applicable to intrastate traffic .....	2,403,815 69	4,923,468 75
Total expense chargeable to intrastate traffic, including interest and taxes...	15,648,024 98	18,341,162 44
Difference between intrastate revenue and expense .....	5,862,447 17	5,108,536 29
Total train mileage in State.....	20,209,264 00	17,763,384 00
Revenue per train-mile intrastate.....	\$1 06	\$1 32
Expense per train-mile intrastate.....	0.774	1 03
Excess of revenue per train-mile over expense per train-mile .....	0.286	0 29

We think these figures demonstrate that the company is earning

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a fair return on its intrastate passenger traffic if we are correct in assigning to interstate traffic its fair share of the expenses, to be based on the assumption that the expense chargeable to interstate traffic should be founded upon the ratio of interstate passenger-miles to the total passenger-miles in the State.

Attention is called to the fact that the total interest charges assigned to the line east for 1915 were more than double the interest charges for the year 1910. It was brought out on the hearing that this was due among other things to the fact that the company had charged against the line east a certain percentage of the total interest charges of the company. These charges include interest on bonds issued to purchase the stocks of other railroads and also interest on bonds of underlying companies outside the State of New York. It was stated by the witnesses for the railroad that it was difficult to determine exactly what proportion of the interest on the obligations of the New York Central Railroad Company should be chargeable to the line east. It does not seem to the Commission that the intrastate traffic in New York should be charged with any portion of the interest on obligations issued to acquire the stock of other companies whose lines are either west of Buffalo or outside of the State of New York. In any event, it is probably true that if it could be determined exactly what amount of interest properly should be charged against the line east, the expenses per train-mile would be somewhat reduced beyond those which are set forth in the last tabulation.

At the hearing on April tenth, objection was made to Exhibit No. 6, filed by the railroad company, on the ground that at the outset of the case it was announced that the railroad company did not intend to go into the question of the valuation of the property nor of interest or fixed charges of any kind. Counsel for the railroad company stated that since the complainants had brought into the case the question of all passenger earnings, interstate as well as intrastate, it was considered proper to present for the consideration of the Commission the entire expense applicable to passenger earnings which would include interest, rentals, and taxes.

At this point it might be proper to consider the following Exhibit No. 6, set forth in full:

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	1910	1911	1912	1913	1914	1915
The total passenger service revenue on the Line East was.....	\$32,024,080 21	\$32,619,568 26	\$34,065,331 31	\$36,514,748 61	\$34,028,415 71	\$34,267,827 60
Total passenger operating expense on the Line East was.....	21,869,508 44	21,761,748 13	23,619,126 82	26,480,098 78	24,081,643 87	21,979,495 39
The total cost of interest and rentals on the Line East was.....	17,161,904 83	18,347,683 36	20,243,006 78	20,835,936 87	22,654,055 76	24,832,574 67
The percentage of maintenance of way applied to passenger train traffic was.....	43.08%	42.67%	41.63%	43.24%	44.02%	42.90%
This percentage, 43.08%, applied to the total cost of interest and rentals would produce amount chargeable to passenger traffic as.....	7,384,787 64	7,828,956 49	8,425,139 40	9,009,459 10	9,972,315 34	10,653,174 53
The total taxes on the Line East were.....	3,816,186 00	4,580,145 41	5,087,013 23	5,537,207 08	5,335,766 41	5,397,095 58
The percentage of maintenance of way, 43.03%, applied to the total taxes would produce amount chargeable to passenger traffic as.....	1,642,104 83	1,954,348 14	2,104,728 90	2,394,288 34	2,348,804 87	2,315,354 00
This latter figure added to the operating expense and net amount of interest and rentals would produce the total expense of passenger traffic on the Line East as.....	30,926,375 91	31,545,052 75	34,148,995 12	37,883,846 22	36,402,763 28	34,948,023 92
The difference between the total revenue on the Line East and the total expense on the Line East is (revenue less than expense <i>id est</i> ).....	1,098,304 30	1,074,515 51	53,683 81	1,869,097 61	8,574,557 67	680,198 38
The total train mileage on the Line East was.....	23,316,560	21,969,806	22,172,272	23,163,928	21,327,908	20,886,098
Dividing the total number of train-miles on the Line East into the total revenue on the Line East would produce revenue per train-mile of.....	\$1.43	\$1.48	\$1.53	\$1.57	\$1.59	\$1.64
Dividing the total number of train-miles on the Line East into the total expense on the Line East would produce expense per train-mile of.....	\$1.38	\$1.43	\$1.54	\$1.63	\$1.70	\$1.67
The difference between revenue per train-mile and expense <i>id est</i> .....	\$0.05	\$0.05	\$0.01	\$0.06	\$0.11	\$0.03

\* Includes mail, express, and excess baggage.



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This exhibit purports to show the total passenger service revenue on the line east, interstate and intrastate, including mail, express, and excess baggage. This revenue, however, does not include a considerable amount derived from other earnings which it was claimed should properly be credited to passenger service revenue, and this same remark applies to other statements relating to passenger revenue. It does not show the amount of operating expenses per train-mile excluding interest, rental, and taxes, nor the percentage of operating expense per train-mile including taxes and excluding interest and rentals. We have therefore prepared the following table to indicate these percentages.

	1910	1911	1912	1913	1914	1915
Total revenue per train-mile.....	\$1.43	\$1.48	\$1.53	\$1.57	\$1.59	\$1.64
Expense per train-mile, including interest, rentals, and taxes.....	0.985	0.99	1.065	1.143	1.13	1.051
Expense per train-mile for interest, rentals, and taxes.....	0.395	0.44	0.475	0.487	0.57	0.619
Percentage of expense per train-mile, including taxes and excluding interest and rentals.....	73.5%	72.7%	75.4%	79%	77.6%	70.8%

The charges for taxes, interest, and rentals have increased rapidly since 1910. That these charges are bound to increase from year to year goes without saying when the trend of the times and the growth of a great system like the New York Central are considered. In this Exhibit No. 6 the total interest and rental charges in 1915 against the lines east were \$24,832,574.67. From our analysis of the statement furnished by the New York Central, showing in detail interest charges and rentals for the year 1915 which was filed as complainants' Exhibit No. 8, we are unable to find any justification for charging against the line east in 1915 more than \$19,353,370.67 as an outside figure for interest and rentals, and this we believe is in excess of the amount which is properly so chargeable. On this basis, if we take the maintenance of way percentage of 42.9 per cent as applied to passenger-train traffic, the amount of interest which should be charged to passenger traffic would not exceed \$8,302,596.02. Adding to this the other expenses as set forth in Exhibit No. 6, we have a total operating

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expense of \$32,597,445.41, or \$1.56 per train-mile, which figure it should be remembered includes not only the bare operating costs but also all fixed charges such as interest on bonds and other obligations, rentals of leased lines, and taxes.

It may be of interest to note that at page 95 of the minutes it was stated that current improvements had been made applicable to passenger traffic, as follows:

Year	Total	Amount applicable to intrastate passengers
1910.....	\$5,310,000	\$2,140,000
1911.....	6,384,000	2,552,000
1912.....	9,881,000	3,870,000
1913.....	7,839,000	3,186,000
1914.....	9,000,000	3,744,000

On cross-examination the witness Vosburgh, representing the railroad, testified that the \$3,744,000 expended for current improvements in the year 1914 and charged to passenger traffic in the State of New York covered improvements to right of way, bridges, stations, etc.; that they entered into the cost of service and were included in operating expenses in its account "maintenance of way and structures." It may be that these amounts properly represent capital expenditures, and if so, then the operating expenses chargeable to passenger traffic would be very considerably decreased. However, we have not considered it necessary to further analyze these particular expenditures because the result would not in any way change our proposed determination.

It is a well known fact that in recent years all of the railroads have been subjected to increased costs of operation. The replacement of wooden passenger cars by others made of steel, the use of larger freight cars and heavier motive power equipment has necessitated the installation of heavier rails and improvements in roadbed and structures. Increased safety has also required the installation of the block signal system. And all of these things have inevitably increased the cost of operation. A large part of the increased expense is due to increasing labor costs which have

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been mounting gradually in recent years; and even at the present time the railroads are confronted by a demand for substantial increases in wages in connection with the passenger service. While we can take notice of these facts, yet we do not know what the additional burden upon the New York Central may be, and we can not determine that an increase in rates should be granted on that account alone. The question of wages which confronts the railroads is a serious one, and there must be a certain point beyond which the demands for increased wages must cease, because if granted the result may be equivalent to a confiscation of the property. Wages can not be steadily increased unless additional earnings are obtained which will provide therefor, and there is a limit beyond which the patient and long suffering public will probably be disinclined to go, because it in the final analysis pays all these labor costs.

While many other exhibits were presented for consideration in this case, yet we do not believe it is necessary for us to discuss them, as we consider that we have dealt with those which are most important for the purpose of arriving at a proper determination with the exception of those relating to the belt line service between Albany and Troy.

Among the tariffs under suspension in this case are those filed by the Delaware and Hudson Company and the New York Central Railroad Company covering rates for passenger service between the cities of Albany and Troy. These tariffs provide for a fifteen-cent single-trip fare between Albany and Troy instead of a ten-cent fare as now charged. There are in force between these cities a forty-six-trip monthly school commutation ticket and a fifty-four-ride monthly commutation ticket which are sold at three dollars and four dollars and fifty cents respectively. No tariffs have been filed changing the rates on these commutation tickets. The basis for interstate tickets between Albany and Troy is now fifteen cents.

The union stations in these two cities are about seven and three-tenths miles apart. The city of Troy is on the east side and the city of Albany on the west side of the Hudson river. The Delaware and Hudson Company and the New York Central Railroad

Company operate what is known as a belt line service between the two cities, the New York Central owning the tracks on the east side of the river and the Delaware and Hudson Company those on the west side. In this belt line operation two substantial steel bridges over the Hudson river form a part of the route. The patrons of this belt line service reside principally in Albany and Troy and the territory intermediate thereto.

The Delaware and Hudson Company receives all tickets collected on trains operated on the west side of the river whether they are Delaware and Hudson trains or New York Central trains, and similarly the New York Central receives all the Albany-Troy tickets collected on the east side of the river. The total receipts from Albany-Troy passengers over the belt lines are divided equally between the two companies. The revenue on intermediate traffic is turned over to the company on whose line the business is done, *i. e.*, the Delaware and Hudson Company gets all the revenue from intermediate traffic on the west side and the revenue from such traffic on the east side goes to the New York Central. Very little baggage or express matter is carried on the belt line trains.

The figures presented to the Commission in relation to this belt line traffic are so conclusive that no extended discussion would seem to be required. They show that the cost per train-mile of operating these belt line trains, for locomotive fuel and repairs, engine house expenses, train supplies, and wages of train crews are more than the revenue per train-mile, and that no earnings are derived from the operation of these trains to provide for station and terminal expenses, maintenance of way and structures, repairs to passenger cars, or for traffic expenses or general expenses. No data, however, has been furnished to show the earnings derived by the New York Central and the Delaware and Hudson Company from passenger traffic originating south of Albany or north of Troy and passing over the tracks on which the belt line trains are operated. It may be that if this traffic were considered the situation would be considerably altered so far as revenue is concerned. The only conclusion we can properly draw from the figures presented is that the belt line trains in and of themselves do not at

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the present time earn enough to cover the expense of operating them. This does not conclusively prove that the fare between Albany and Troy should be increased, but it may be a fair indication that there is more service being given on the belt line than the traffic justifies. The Delaware and Hudson Company is obliged by law to give reasonable passenger train service on the west side of the river between Albany and Green Island, if not into Troy; and on the other hand, the New York Central is likewise obliged to give reasonable passenger train service between Rensselaer and Troy on the east side of the river. Perhaps the two corporations determined that this could be accomplished better and more economically by the operation of a belt line than to have each company operate passenger trains independently from Albany to Troy.

If we accepted the theory of counsel for the New York Central, that the whole passenger traffic in the State must be considered in connection with any increase of rates, further attention to this particular phase of the situation would be unnecessary, because we understand the earnings of the belt line trains on the east side of the river by the New York Central are included in the train operations covered by the title "main line and branches" in the New York Central Exhibit No. 8. The railroad companies, however, having sought to present the facts with reference to the belt line operation separately, we have determined to so consider them, and not pass the subject by without giving some explanation of the reasons which have caused us to reach the determination that the belt line fares should not be increased at this time.

While dealing with the proposed increase in fares on the belt line, we desire to call attention to the fact that even if we had concluded an increase in these fares was justified, the portion of the tariff which has been filed and under suspension relating to this service is not properly constructed, for the reason that while the proposed fare between the two cities is fifteen cents, or approximately two cents per mile, yet the proposed fare between certain intermediate stations is based on two and one-half cents per mile. Inasmuch as any increase between these intermediate stations

would in practically every instance be quite substantial, any increased fare should properly be based on the rate per mile between Albany and Troy. Under the circumstances, however, and in view of what we have hereinbefore stated, we are of the opinion that the Delaware and Hudson Company and the New York Central Railroad Company have not justified the proposed increased fares on the belt line.

There may be some changes in the existing tariffs of the New York Central which are made necessary by mileage changes, and if so, they should be permitted, and separate tariffs should be filed to cover them.

While we had thought it would be unnecessary to discuss the various legal propositions presented, nevertheless the complainants filed a supplemental brief covering a point which ought not to pass unnoticed. It is with reference to chapter 216 of the Laws of 1846 under which the Hudson River Railroad Company was incorporated. This act was amended by chapter 30 of the Laws of 1848, and by chapter 9 of the Laws of 1850. Chapter 30 of the Laws of 1848 was amended by chapter 210 of the Laws of 1884. The original act of 1848 has never been expressly repealed, except section 18 which was repealed by chapter 593 of the Laws of 1886. Counsel for the complainants therefore contend that the New York Central Railroad Company is limited as to its fares on the Hudson River division by the provisions of the law of 1846 above referred to and its amendments. This contention is untenable. The Court of Appeals has disposed of the matter in the case of *Johnson v. Hudson River R. R. Co.*, 49 N. Y. 455, in which case it held that the limitation as to fares had been removed by the General Railroad Act of 1850, chapter 140, section 49. This case was decided in 1872, and since that time the situation has been governed by this ruling of the Court of Appeals.

Under the circumstances, therefore, it is apparent that this contention of the complainants on this proposition can not be upheld, and that the New York Central Railroad Company is not limited on its Hudson River division to the rate of fare set forth in chapter 216 of the Laws of 1846.

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From all the evidence which has been presented to us in this case, we are convinced that the New York Central has failed to justify any increase in its fares on its Hudson division between Albany and New York. As we have hereinbefore stated, the main line of the New York Central, even with the maximum fares ranging from two cents to two and seventeen one-hundredths cents per mile, is earning a fair return, and the earnings on several of its other divisions are probably insufficient to pay a fair return on the passenger service on those divisions. We call attention to the fact here, that on some of those divisions, namely the Putnam and the Harlem, the existing tariffs are full of discriminations, and the tariffs which are now under suspension would probably remove many of these discriminations. In any event, it would seem advisable for the company to give prompt consideration to the criticism here made of the existing tariffs on these particular divisions, to the end that discriminations may be removed. It would probably necessitate some study on the part of the railroad officials to determine whether or not it will seek to advance the rates on any of the divisions which are now operated at a loss, and for that reason we think the better way to dispose of the matter is to require the cancellation of all the passenger tariffs filed by the New York Central which have been under suspension pending this investigation and an order will be entered to that effect.

All concur except Commissioner Emmet, dissenting in part.

EMMET, Commissioner.— With many of the statements of fact, and with some of the conclusions expressed in the majority opinion in this case, no unprejudiced person will find reason for substantial disagreement. If the question before us was only whether the New York Central Railroad Company can, in view of its earnings during the year 1915 and part of 1916, be considered sufficiently in need of increased revenues to require us upon this ground alone to approve of the rate increases provided for in the new tariffs which have been filed with us, I think I am nearly enough in accord with Mr. Carr's expressed views on this point to justify me in accepting them as substantially my own.

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But I have been unable to satisfy myself entirely that the question of the adequacy of the present returns from intrastate passenger business is the only question involved here. The present proposal impresses me rather as an attempt to readjust, than as an attempt to raise, existing tariffs. That the plan should provide for increases as well as decreases in existing rates is, of course, inevitable under the circumstances. Leaving commutation rates near New York city out of the question entirely — for these are not affected by the new schedules — most of the increases would occur on the Hudson and Harlem divisions where the prevailing rate is now about two and seventeen one-hundredths cents per mile. Even on one of these divisions (the Harlem division) decreases as well as increases would take place, due to the removal of ancient local discriminations which have crept into the New York Central's tariffs in the course of years — as similar discriminations have doubtless crept into the tariffs of many other utility companies during the same period. The Hudson and Harlem divisions are those upon which it may be said, speaking broadly, that the most improved service is now being given to the public. The divisions upon which rate reductions will under the new schedules predominate over increases are those upon which, on account of local needs and conditions, the service has in the past been least modern, or as the saying is, "up-to-date." The new schedules will, if allowed to take effect, result in the correction of these inequalities, and in establishing — so far as this may be done under certain provisions in the company's New York charters — absolute uniformity in passenger rates on the New York Central system throughout the State, except as to those rates which obtain in the properly recognized and so called "commutation zone" near New York city, and on the Troy-Albany belt line service hereinafter referred to.

I have felt that this application should be viewed somewhat in the light of these resulting public benefits and advantages, and that the possible effect which an incidental raising of some existing rates may have upon the finances of the New York Central system should be regarded as only one feature of the case, and not



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necessarily a controlling feature. There is nothing in the case to show, as a matter of fact, that the ultimate effect of the new tariffs will in the long run be to raise the company's intrastate passenger revenues materially. As to whether it does or not, depends upon many future happenings which can not accurately be forecasted now. The most that can be said is that if all other factors involved in the problem remain about as they are today the readjustment of rates would, if it went into effect, probably — though by no means certainly — result favorably to the railroad from a financial point of view. But the mere fact that this is anticipated, or at least hoped for, by the owners of the railroad, does not seem to me to free us from the duty of inquiring carefully into the other aspect of the case that I have mentioned.

For the purposes of this argument I am assuming that this Commission has power to approve of rate increases upon other grounds than need of additional revenue. I find nothing either in our statutes or in the decisions of our courts which seriously shakes my belief that we have such power. The question, then, is whether the announced intention of the New York Central Railroad Company to take, with the aid of this Commission, a long step forward toward the establishment of absolutely uniform passenger rates throughout the State of New York does not contain enough of public benefit and advantage to warrant us in giving our approval to such incidental (and as expressed in percentages, slight) rate increases as are necessary for the carrying out of the plan; leaving the doubtful question of the effect which the readjustment will have in the long run upon the finances of the company to be determined hereafter, not by guesswork but as the result of actual experience with the new rates.

Looking at the matter from this point of view we ought, I think, to bear in mind, first, that a pretty definite governmental policy in favor of uniformity in railroad rates has crystallized during recent years, not only in New York but throughout the United States. This tendency has expressed itself both in legislation and in the decisions of our courts and regulatory bodies. On the whole, I think the movement has been a movement in the right

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direction. It is perfectly true, of course, that conditions differ in different parts of the territory served by a great railroad system like the New York Central, and under an ideal system of rate making the neighborhoods in which railroad service has remained most nearly in its primitive state ought perhaps to pay lower rates than neighborhoods in which a highly modern and efficient service is given. This is on the simple principle that people ought not to have to pay for more than they get — that those who get the best ought to pay the most. Practically, however, the tendency has been the other way, until the countertendency of which I speak, on the part of legislatures and regulatory bodies, toward uniformity in rates, occurred to check it. Sparsely settled regions with primitive railway service have for the most part been paying higher rates than neighborhoods in which the last refinement of modern transportation has been installed. To some extent this is now the situation on the New York Central system, and the present effort to make rates uniform on that system seems to me to be about the first practical step that has been taken to deal with conditions which, theoretically at least, can not be defended. And I am inclined to believe that no nearer approach to the ideal than a substantial uniformity in railroad rates over a large system can ever be hoped for. The varying grades of service given by a railroad like the New York Central on its different divisions may be assumed, I suppose, to approximate fairly closely in each case to the varying needs of the neighborhoods which are served. Simple, unpretentious trains, and comparatively infrequent runs, in a sparsely settled region where travel is light, may be assumed to meet the needs of such a neighborhood almost if not quite as well as the best of service meets the needs of a thickly settled and busy region. Whenever improvements in service are needed the regulatory powers of the State may, if the railroad is in a prosperous condition financially, be speedily resorted to, to set the matter straight. It seems from this point of view to be a reasonable theory that if all localities are served approximately as their differing needs require — if in each locality the same relative approach to the ideal, in the matter of service, takes place — all localities

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should pay approximately the same rate a mile for the service they get.

Looking at the matter from this point of view, I feel favorably inclined toward the idea of uniform rates on the New York Central for two reasons: *First*, I think the principle of uniformity can be justified, upon abstract grounds, as in the long run substantially fair; *second*, I think that so far as the New York Central is concerned, the application of this principle would result in correcting, in the only practicable manner, an extremely unethical and discriminatory condition which now exists between this company and its patrons in different parts of the State,— a condition under which rates are at present highest where service is poorest, and lowest where service is best.

It has been suggested that because the plan we are considering contemplates no change in the rates now in force on branches of the system where a two-cent rate has been established by charter, the present attempt to equalize rates should be viewed unfavorably. I do not agree with this view, although I admit that, for the reason stated, the plan now before us is not as comprehensive a step toward uniformity in rates in New York State as should ultimately be taken. But this seems to be an inherent difficulty in the situation for which the railroad itself is not responsible. It may be that under the recent decision of the Court of Appeals in the Ulster and Delaware case, which sustained the right of the Public Service Commission to approve of increases in rates established by general legislative enactment, it will ultimately be held by the Court of Appeals that the Commission has power also to approve of increases in rates which were fixed by the State as a fundamental condition of the railroad's right to exist at all. The underlying reasons for the Ulster and Delaware decision may ultimately carry the Court of Appeals to that point. But there are some fairly strong considerations to be urged on the other side; and on the whole I do not feel that the railroad's failure to include its rates between Albany and Buffalo in the present plan suggests any such deliberate desire to bring about only a partial uniformity of rates in the State of New York at this time as would warrant our rejecting the present application on this account.

It seems to me that for the purposes of this application the railroad is quite justified in assuming that the Public Service Commission would have no authority to approve an increase in rates fixed by charter, and that the Commission is justified in acting on the same assumption. Therefore, notwithstanding the fact that the present proposed readjustment makes no effort to deal with rates between Albany and Buffalo, it is fairly entitled, I think, to be regarded as an effort made in absolute good faith by the New York Central Railroad Company to establish its passenger rates in New York State on a more equitable basis than they have ever been on previously — an effort which should not, in my opinion, be thwarted by this Commission merely because the Albany-Buffalo rates are not included in it. I assume, of course, that whenever the question of the jurisdiction of the Commission over these last mentioned rates shall be settled in favor of the Commission's right to permit them to be increased, new tariffs designed to equalize disparities between the present Albany-Buffalo rates and rates on the other divisions of the Central's system will be filed with us, whether the present application is granted or not. Pending that event I see no reason to interfere with what seems to me to be a highly commendable, though admittedly only a first, step toward establishing fairer conditions in respect to railroad passenger rates in New York State than have hitherto existed.

Turning now to the question whether the charge of two and one-half cents per mile proposed by the railroad as a new standard rate for ordinary passenger transportation in New York State is unduly high, I shall content myself at this time with saying that I have been entirely unable, from anything in the record of these proceedings, to conclude that this rate would prove excessive or unfair from the standpoint of the public, or that it would be productive of any larger revenue to the railroad company, compared with the expense of carrying on its intrastate passenger business, than the company has a right to expect from this branch of its activities. This application, it must be remembered, has been made to us virtually under instructions, or at least upon strong suggestions, from the Interstate Commerce Commission, which

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has taken the position that railways are entitled to an adequate return upon their freight and passenger business considered separately. The Interstate Commerce Commission has itself already permitted the New York Central Railroad Company to raise its rates for interstate passenger transportation to two and one-half cents per mile. These rates are now in force between points in New York State and points in other States, and upon such interstate business they apply as well to the portions of the runs which are within the State of New York as they do to the distances outside the State. For instance, a traveler from New York city to Chicago now pays two and one-half cents a mile between New York city and Buffalo, whereas an intrastate traveler between these last named points pays the lower intrastate rates now in force. The rate of two and one-half cents a mile which the Interstate Commerce Commission permits the railroad to charge upon distances within the State of New York that are included in interstate runs, and which the railroad now asks us to allow upon intrastate business, varies little, if at all, from the average rate which has been recognized more than once by State Legislatures, by Federal courts, and by regulatory bodies throughout the United States, as a reasonable uniform rate for passenger transportation. The existing rates — frankly discriminatory in many instances, as I have pointed out — vary, it will be remembered, from two to three cents per mile. The new rate is less than is being charged by other trunk railroads running out of New York for service comparable in every way with that which the New York Central supplies on the divisions of its system upon which most of the increases will occur under the new schedules. For instance, on the Pennsylvania railroad a single ticket to a point 143 miles distant from New York — the same distance as Albany is from New York on the New York Central — costs three dollars and sixty cents, and a round-trip ticket seven dollars and twenty cents. For the same distance on the New York, New Haven and Hartford, a single ticket costs three dollars and eighty-eight cents, and a round-trip ticket seven dollars and seventy-six cents. On the Central Railroad of New Jersey the figures are respectively three

dollars and fifty-five cents and seven dollars and five cents; on the Delaware, Lackawanna and Western, three dollars and eighty-five cents and seven dollars and five cents; on the Erie, three dollars and sixty cents and seven dollars and twenty cents. As against these figures, a single ticket on the New York Central railroad New York city to Albany, a distance of 143 miles, now costs three dollars and ten cents, and a round-trip ticket five dollars and seventy-five cents. Under the readjustment that is proposed, the cost of a single ticket from New York city to Albany would be three dollars and fifty-eight cents, and of a round-trip ticket six dollars and sixty-five cents. I mention this Albany rate as typical of the rates in which the largest increases under the new schedules would occur. The contrast between the proposed new rates on those branches of the New York Central system which would show the largest increases under the new schedules, and the rates for similar service on the other large trunk lines I have named, seems to be especially significant when taken in connection with another fact which has been established in this proceeding — the fact, namely, that the volume of travel between New York and Philadelphia on the Pennsylvania, and between New York and Boston on the New Haven, is very much greater than the volume of travel on the New York Central between New York city and Albany. The cost of the service to the individual traveler ought, one would suppose, be correspondingly less under these circumstances. Instead of that it is greater. A comparison of this sort, while it can not perhaps be regarded as entirely conclusive, corroborates the view (which nothing in the record in this case seems to controvert) that even the largest increases which will result from the new tariffs on the New York Central involve no such obvious injustice to the traveling public of this State as to warrant this Commission in rejecting, upon this ground, the tariffs which have been filed with it.

Personally, I am not greatly alarmed by the suggestion that under these new tariffs the railroad may temporarily enjoy an opportunity of extracting exorbitant profits from the traveling public. We do not know whether 1915 and 1916 conditions are

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going to last during the next five or ten years, nor what the cost of labor and material is going to be, nor what will be the effect of the proposed rate readjustment upon the volume of the company's business. We know this, however,— that the more prosperous a public utility company is, the better is the quality of the service which can be insisted upon from such a corporation by the people and by public service commissions. It is in good service, rather than in rates shaved down to the last fraction of a cent, that the public, I think, is chiefly interested. As a regulatory official I should certainly feel much freer, if the present plan of rate readjustment were approved, to insist upon the very highest type of service throughout the entire New York Central system in New York State, than I would if this application were denied. So that, apart altogether from those desirable effects which may be anticipated from the removal of discriminations and inequalities in existing rates, I believe that the public interest will be largely advanced, in better and better service, if the new tariffs are allowed to take effect.

It goes without saying, of course, that if after a fair trial these new tariffs should be found to result in unwarranted profits to the New York Central Railroad Company, they would, in this era of commission regulation, be revised downward very quickly. I, for one, would stand absolutely ready to unite in action of that sort the moment it became obvious that a uniform two and one-half cent rate for the transportation of intrastate passengers on the New York Central system in New York State is too high. My position is, that upon the facts before us no sufficient grounds exists for believing that a two and one-half cent rate is in anywise extortionate. I can see, on the other hand, where many existing discriminations and inequalities will be eliminated by putting such a rate into effect; and the whole situation would at least be placed, by taking such a step, upon that basis of uniformity which has received the sanction of law, and which seems to have commended itself, both to practical people and to rate-making experts throughout the United States, as on the whole the best working solution of the complicated problem of railroad rate making.

Holding these views, I am compelled with all diffidence to express my dissent from the chief conclusions which my colleagues have arrived at in this interesting and important matter. With one detail of their decision, however, I wish to express myself as in substantial accord. I do not believe that the so-called belt line rates between Troy and Albany should be raised. This Troy-Albany situation seems to me to correspond nearly enough with the situation within the commutation zone near New York city to warrant its being treated as a separate and special matter, and I think that the schedules which have been filed by the railroad company on its Troy-Albany branch should be disallowed. In other respects my view is that the new schedules should be given a trial, and corrected if actual experience with them shows that their public disadvantages, in the shape of extortionate profits to the railroad, outweigh the advantages to which I have called attention in the foregoing memorandum.

VAN SANTVOORD, Chairman.—There is something attractive, if only as an appeal to the sense of orderliness and symmetry, in the suggestion of a uniform rate of passenger fares throughout the entire sphere of operation in this State of the applicant corporation. But I am unable to accept Commissioner Emmet's conclusion that what he terms the "principle of uniformity" properly may be applied to the precise extent embodied in the schedules under review. To such a determination there are two fatal objections.

Under the provisions of the Public Service Commissions Law and the decisions of the courts, increased rates of an established railroad enterprise can be justified only by the proven need of additional revenue. The proposition of law involved in this first consideration has been adequately discussed in the prevailing opinion herein; while it is conceded in the dissenting opinion that the need of additional revenue has not been sufficiently established to justify the proposed increased rates.

But even if the foregoing is disputed and this Commission actually is empowered to approve of increases upon grounds other



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than an established need of additional revenue, the record discloses that instead of recognizing the "principle of uniformity" the proposed rates actually accentuate some of the existing inequalities and discriminations in the passenger tariffs of the corporation. It is in respect of this second objection to Commissioner Emmet's conclusion, and because of a recent and most important construction of the rate-making powers of this Commission by the court of last resort, that I feel impelled to observe briefly, as follows:

What is termed the main line of the New York Central railroad extends from Buffalo 297 miles east to Albany, and thence 143 miles south to New York city. In the original charter granted in 1853 to the New York Central Railroad Company, now a part of the recently consolidated corporation of the same name, way fares between Albany and Buffalo were limited to two cents per mile, at which rate such fares have obtained to the present time. By chapter 216 of the Laws of 1846, way fares between New York and Albany on the Hudson River railroad, now a part of the New York Central railroad, were limited to two cents per mile during the summer and 2 and one-half cents per mile during the winter — the last mentioned term thereafter legislatively defined to include the months of December, January, February, and March. But in an action to recover penalties for excess fares charged between Spuyten Duyvil and Thirtieth Street station in New York city, the Court of Appeals held that the rate limitation in the act of 1846 had been removed by the General Railroad Act of 1850, chapter 140, section 49. *Johnson v. H. R. R. R. Co.*, 49 N. Y. 455. Since the year 1909, way fares between New York and Albany (other than in the so-called commutation zone near New York city) have been at the rate of substantially two and seventeen one-hundredths cents per mile; and it is these fares which are increased to two and one-half cents per mile in the schedules under review.

As illustrating the proposition that the new rates tend rather to enlarge existing inequalities than to establish uniformity, the following examples have been formulated:

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	From	To	Distance	Present fare	New fare
1. (a)	Albany.....	Amsterdam (west) .....	33 m.	\$0 66	\$0 66
	(b) Albany.....	Greendale (east) .....	33 m.	0 72	0 83
2. (a)	Albany.....	Little Falls (west).....	74 m.	1 48	1 48
	(b) Albany.....	Poughkeepsie (east)....	70 m.	1 52	1 75
3. (a)	Albany.....	Canastota (west) .....	127 m.	2 54	2 54
	(b) Albany.....	Yonkers (east) .....	128 m.	2 78	3 20
4. (a)	Albany.....	Syracuse (west) .....	148 m.	2 96	2 96
	(b) Albany.....	New York city (east)...	143 m.	3 10	3 58

How does it tend to establish uniformity in rates to increase the fare of a passenger on the Empire State express from New York to Albany, a distance of 143 miles, from three dollars and ten cents as at present to three dollars and fifty-eight cents as proposed, while continuing to charge a passenger on the same train only two dollars and ninety-six cents for transporting him to Syracuse, which is 148 miles west of Albany? Why should a passenger traveling on the main line of the railroad east of Albany (called "east" in the corporation's traffic and operating parlance, although the direction from Albany actually is south) pay at the rate of one-half cent per mile more than one traveling on the main line west of Albany? Why should some poor — but honest — lawyer, resident let us say in Yonkers, 128 miles south of Albany, after an unsuccessful attempt to persuade the Court of Appeals that two and two make five, have his declining spirits further assailed by the compulsion of paying three dollars and twenty cents (forty-two cents more than formerly) for return transportation from Albany to the hydropathic gloom of his reproachful hearthstone, while his successful adversary gaily rides back to the acclaim of his client and the admiring plaudits of neighbors at his home in Canastota, a like number of miles west of Albany, at a transportation charge of only two dollars and fifty-four cents? Is it because in the making of rates the "principle of uniformity" must nevertheless not be applied in too absolute disregard of the scriptural allegation, that from him who hath not shall be taken away even that which he hath?

As a more serious answer to such troublesome questions, it is suggested that under existing statutory restrictions the railroad

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company has at present gone as far as possible in the establishment of a two and one-half cent per mile rate for passenger transportation over the various lines of its system; but that if and when it shall be determined that under the decision in the Ulster and Delaware case the charter restrictions as to rates on the New York Central between Albany and Buffalo must yield to the regulatory power of this Commission to permit an increase in such rates, doubtless steps will be taken by the railroad "to equalize disparities between the present Albany-Buffalo rates and the rates on the other divisions of the New York Central system."

Several months before the New York Central tariffs under consideration were filed with this Commission, it had been determined by the Appellate Division that in a proper case (where the need of increased revenue is established) this Commission has authority to permit a railroad corporation to increase its rates beyond a maximum established by general statute. *People of the State of New York ex rel. Ulster & Delaware R. R. Co. v. Public Service Commission*, 171 App. Div. 607. This decision was affirmed by the Court of Appeals May 2, 1916 (218 N. Y. 29), at which time the hearing instituted by this Commission as to the propriety of the rates under discussion had been closed. As far as this Commission is informed, no move has been made by the New York Central to take advantage of the decision in the Ulster and Delaware case in bringing about an equalization of the disparities in rates for transportation of passengers between Albany and Buffalo and between Albany and New York, respectively. Possibly the corporation does not concede that the decision in question is good law. At least, it is intimated that the railroad has assumed the Commission is without authority to approve an increase in rates which have been fixed by charter; and it has been suggested that the decision in the Ulster and Delaware case might not apply in an attempted increase in rates by the New York Central over the maximum fixed by charter, because in the Ulster and Delaware case it was merely a general law which was deemed repealed or rather modified by implication in another general law: whereas it is urged that such modification or repeal of a special law can be accomplished only by express statute.

Apart from its doubtful soundness as an original proposition, the argument falls before the decision of the court of last resort in the Johnson case above cited, where it was held that the maximum fare restriction imposed upon the Hudson River railroad by the special act of 1846 was repealed by implication by the general railroad act of 1850. Plainly, in the mind of the Court of Appeals there is no distinction to be drawn between a special and a general statute in determining whether there has been a repeal or modification thereof of implication found in a general law. In anticipation of the possible rejoinder that questions as to the repeal or modification of charter provisions are not to be determined by the same reasoning applied to solution of similar questions in respect of ordinary special acts, and that rate restrictions imposed in a charter are to be considered as in the nature of a condition to the granting of such charter, from which condition the obligee corporation may be released only by express legislative sanction, it is to be noted that the act of 1846 incorporating the Hudson River Railroad Company was in the highest sense a charter, because at that time there existed no other method of instituting a railroad enterprise than by legislative act. Thus it will be found that no certificate of incorporation of the Hudson River Railroad Company has ever been filed in the office of the Secretary of State.

I am unable to escape the conclusion that under the decisions cited this Commission has abundant authority in a proper case to allow the New York Central Railroad Company to charge in excess of two cents per mile for way fares between Albany and Buffalo, notwithstanding the charter restriction above stated. Should the Commission hesitate to exercise such authority to the point of legalizing a manifest discrimination against a portion of the public simply because "fairly strong considerations" may be urged against what seems to be a common sense application of the principle laid down in the Ulster and Delaware case above cited? The power of the Commission established by the court in that case is in our opinion precisely that which ought to be bestowed upon a regulative body of this sort. And now that

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this broad jurisdiction in rate making has thus been judicially defined, ought the Commission to stay its hand in dealing out an even measure of justice to all the communities along the main line of this great trunk line system merely because the carrier may have assumed that the Commission has only jurisdiction to dispense partial justice?

If the foregoing conclusions are sound — and it would seem that their acceptance rests upon common respect for the authority of the court — and the Commission accordingly is clothed with full power of approval in the premises, why should not the passenger traffic between Albany and Buffalo share ratably with the traffic between Albany and New York the burden of such increased fares as are required by the financial necessities of the enterprise? Or if, as suggested in the dissenting opinion, need of greater income is not an absolute prerequisite to increased fares, which latter properly may be predicated upon other considerations — such as the “principle of uniformity” — why at least should not that principle be applied impartially, thus distributing the burden attending the accomplishment of this rate making ideal, if such it be, between all travelers on the main line of the railroad? Not impossibly this might be accomplished by fixing the uniform fare at two and one-quarter cents per mile, under which rate the “trial test” suggested by the Commissioner could be made as satisfactorily as, and with less discrimination than, under the higher rate proposed for the Hudson River division alone.

In fine, if the corporation is actually in need of additional revenue from its passenger traffic; or if, as the prevailing opinion declares, inadequate rates are exacted on the Harlem and Putnam divisions; or if, as implied in certain reductions of existing rates which appear in the proposed tariffs, a revision downward here and there in the existing tariffs is fair and equitable; or if, as so persuasively outlined in the dissenting opinion, absolute uniformity in intrastate rates — outside of recognized commutation zones so called — should be regarded as the *summum bonum*; in short, upon whatsoever grounds increased rates are to be justified, why should substantially the entire burden of the “readjust-

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ment" fall upon people traveling to or from points between Albany and New York on the eastern division of the main line? Under such a one-sided and inartificial application of the principle of uniformity it seems to me that the idea would inevitably arouse a more or less deserved disapprobation at one end of the State; while as the only price for thus being left undisturbed in the unique and splendid isolation of their two-cent zone the dwellers along the occidental division of the road might no longer justly and philosophically observe that "the further we go west the more convinced we are that the wise men came from the east."

In the Matter of the Petition of EDISON ELECTRIC LIGHT AND POWER COMPANY OF AMSTERDAM, N. Y., under Section 69 of the Public Service Commissions Law, for Authority to Issue \$327,00 Common Capital Stock, a First Mortgage for \$1,500,000 and \$350,000 in 5 Per Cent Bonds to be Secured by Said Mortgage

In the Matter of the Petition of the FONDA, JOHNSTOWN AND GLOVERSVILLE RAILROAD COMPANY, for Leave to Acquire 2,770 Shares of the Capital Stock of Said Edison Electric Light and Power Company of Amsterdam, N. Y.

Case No. 5290

(Public Service Commission, Second District, June 13, 1916)

Permission granted to an electric railroad company to acquire shares of the capital stock of an electric light and power company.

The Edison Electric Light and Power Company of Amsterdam, N. Y., was authorized on April 4, 1916, to issue certain of its common capital stock and execute a mortgage and to use the proceeds realized from the sale of said securities for outstanding indebtedness and accounts payable. It now owes the railroad company \$268,659.04, and the railroad company, as the owner of the entire issued capital stock of the electric light company, except directors' qualifying shares, asked for leave to purchase and hold 2,770 shares of the capital stock of the Edison Company. Such purchase to be paid for by satisfying an equal amount of obligations of the Edison Company.

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By THE COMMISSION.—By order entered herein on the 4th day of April, 1916, the Edison Electric Light and Power Company of Amsterdam, N. Y., was authorized to issue at not less than its par value \$277,000 par value of its common capital stock, execute a mortgage for \$1,500,000 and issue thereunder at not less than 85 per cent of their face value \$400,000 face value of 5 per cent thirty-year first mortgage gold bonds, the proceeds realized from the sale of said securities to be used among other things for the discharge of bills payable outstanding to the aggregate amount of \$564,122.54 and accounts payable amounting to \$17,367.88.

It appears that \$268,659.04 of the former and all of the latter are now owing to the Fonda, Johnstown and Gloversville Railroad Company, and by application filed herein on the 6th day of June, 1916, that company which now owns the entire issued capital stock of the Edison Electric Light and Power Company of Amsterdam, except directors' qualifying shares, prays for authority to purchase at par and hold the 2,770 shares each of the par value of \$100 of common capital stock of the said Edison Electric Light and Power Company of Amsterdam, N. Y., heretofore authorized herein, or any part thereof, such purchase to be paid for by satisfying an equal amount of obligations of said Edison Company held by the petitioner herein.

Now, therefore, upon the foregoing record, ordered as follows:

1. That the Fonda, Johnstown and Gloversville Railroad Company is hereby authorized to purchase, acquire and hold, all or any part of the 2,770 shares of common capital stock each of the par value of \$100 of the Edison Electric Light and Power Company of Amsterdam, N. Y., authorized to be issued by order of this Commission dated April 4, 1916, heretofore entered in this proceeding, which stock shall be paid for by the satisfaction of an amount of obligations of said Edison Company held by the petitioner herein equal to the par value of the stock so acquired and held.

2. That the Fonda, Johnstown and Gloversville Railroad Company shall for each six months period ending December thirty-

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first and June thirtieth file not more than thirty days from the end of such period a verified report showing:

- (a) What stock has been acquired in accordance with the authority contained herein and the date of such acquisition;
- (b) From whom such stock was acquired;
- (c) What obligations of the Edison Electric Light and Power Company of Amsterdam, N. Y., have been discharged in consideration of such acquisition;
- (d) Any other terms and conditions of such acquisition.

Such reports shall continue to be filed until all of the stock heretofore authorized herein shall have been issued in accordance with the authority contained in the orders entered herein, and if during any period no stock was purchased the report shall set forth such fact.

3. That the Fonda, Johnstown and Gloversville Railroad Company shall within thirty days from the service of this order advise the Commission whether or not it accepts the same with all its terms and conditions.

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In the Matter of the Petition of the SENECA-GORHAM TELEPHONE COMPANY, under Section 101 of the Public Service Commissions Law, for Authority to Issue \$5,000 in 6 Per Cent Bonds Under an Existing First Mortgage, and for Ratification of the Issuance of \$2,600 of Such Bonds

Case No. 5222

(Public Service Commission, Second District, June 13, 1916)

Telephone companies — application to issue \$5,000 in 6 per cent bonds under an existing mortgage.

The petition in this matter was filed on October 2, 1915; the report of the division of capitalization was made December 8, 1915, and an amendatory petition was filed on January 14, 1916, on which the electrical division reported May 11, 1916, and the final report of the division of capitalization was made under date of June 6, 1916.

BY THE COMMISSION.—Now, therefore, upon the foregoing record, ordered as follows:

1. That the proposed journal entry contained in the report of



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the division of capitalization in this proceeding dated December 8, 1915, which on December 15, 1915, was sent to the corporation, such entry being listed on page 8 thereof as modified by the final report of that division, dated June 6, 1916, shall be entered upon the books of the Seneca-Gorham Telephone Company, and that within thirty days from the service of this order verified proof shall be submitted to the Commission that such entry has been made.

2. That the issuance and sale at their face value at various times from September 23, 1911, to August 16, 1915, by the Seneca-Gorham Telephone Company of a total of \$5,200 face value of its 6 per cent fifteen-year first mortgage gold bonds, the proceeds of which were used to pay debt and for new construction is hereby authorized *nunc pro tunc*.

3. That the Seneca-Gorham Telephone Company is hereby authorized to issue \$5,000 face value of its 6 per cent fifteen-year first mortgage gold bonds under a certain indenture dated July 31, 1906, given to Edward G. Hayes, as trustee, to secure an authorized issue of a total face value of \$50,000.

4. That said bonds of the total face value of \$5,000 shall be sold for not less than 95 per cent of their face value and accrued interest to give net proceeds of at least \$4,750.

5. That said bonds of the face value of \$5,000 so authorized or the proceeds thereof to the amount of \$4,750 shall be used solely and exclusively for the payment and discharge of six one-year promissory notes with interest outstanding at July 1, 1915, or their renewals as follows:

Date	Payable to	Interest paid to	
(a) Jan. 20, 1905	E. A. Squire....	April 1, 1915 .....	\$1,000
(b) Jan. 23, 1905	E. A. Squire....	April 1, 1915 .....	500
(c) March 12, 1905	W. C. Squire....	April 1, 1915 .....	1,000
(d) July 1, 1905	G. C. Squire....	Feb. 11, 1915 .....	1,000
(e) April 1, 1906	G. W. Taylor...	April 1, 1915 .....	800
(f) April 1, 1908	H. C. Hipolite..	April 1, 1915 .....	700
			<hr/> \$5,000
Amount unprovided for.....			<hr/> \$250 <hr/>

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6. That if the said bonds of a total face value of \$5,000 herein authorized shall be sold at such price as will enable the company to realize net proceeds of more than \$5,000 no portion of the proceeds of such sale in excess of the last aforesaid sum shall be used for any purpose without the further order of the Commission.

7. That none of the said bonds herein authorized shall be hypothecated or pledged as collateral by the Seneca-Gorham Telephone Company unless any such pledge or hypothecation shall have been expressly approved and authorized by this Commission.

8. That the Seneca-Gorham Telephone Company shall for each six months' period ending December thirty-first and June thirtieth, file not more than thirty days from the end of such period a verified report showing:

(a) What bonds have been sold or otherwise disposed of during such period in accordance with the authority contained herein, and the date of such sale or disposition;

(b) To whom such bonds were sold;

(c) What proceeds were realized from such sale;

(d) Any other terms and conditions of such sale;

(e) The amount expended in reasonable detail of the proceeds for the purpose specified herein during such period, and stating to what account or accounts such expenditures have been charged.

Such report shall continue to be filed until all of said bonds shall have been sold or disposed of and the proceeds expended in accordance with the authority contained herein, and if during any period no bonds were sold or disposed of, or proceeds expended, the report shall set forth such fact.

9. It is nevertheless expressly provided that in all respects other than as directed in ordering clause No. 1 hereof, this order shall not be effective, and particularly that no bonds shall be issued or sold hereunder by the applicant, nor shall the issue or sale of any such bonds be deemed to have been approved and authorized by this Commission unless and until compliance with the requirements of ordering clause No. 1 of this order shall have been made, reported to and approved as sufficient by this Commission and until the further recommendations set out in the

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report of the division of capitalization dated December 8, 1915, and the final report of that division dated June 6, 1916, shall have been fully satisfied.

10. That the authority contained in this order to issue bonds is upon the express condition that the petitioner accepts and agrees to comply in good faith with the provisions hereof and before any bonds are issued pursuant hereto, and within thirty days of the service hereof, the said company shall file with the Commission a satisfactory verified stipulation duly authorized by its board of directors accepting this order with all its terms and conditions, and such order shall be void and of no force or effect until such stipulation shall have been filed as required herein.

Finally, it is determined and stated, That in the opinion of the Commission the money procured and to be procured by the issue of bonds herein authorized was and is reasonably required for the purposes specified in this order and that such purposes are properly chargeable to operating expenses.

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**In the Matter of the Petition of the NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, as to Discontinuance of Operation of Passenger Trains on the Rome, Watertown and Ogdensburg Railroad, Lessee, between Rochester and Windsor Beach, the Trains to Be Operated on the New York Central Charlotte Branch; and under Section 34 of the Railroad Law for Consent to the Discontinuance of the Rome, Watertown and Ogdensburg State Street Passenger Station in Rochester.**  
**Modification of Order**

**Case No. 331**

**(Public Service Commission, Second District, June 13, 1916)**

**Modification of an existing order asked for by the New York Central and Hudson River Railroad Company as to details of operating between Rochester and Windsor Beach.**

The New York Central and Hudson River Railroad Company asked for authority to modify an order made March 3, 1915, so as to permit

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the operation of trains at all hours on Saturday, Sunday and other days when no schools are in session, and hence there is no danger to school children in so doing, at a certain specified grade crossing within the city of Rochester.

BY THE COMMISSION.—Originally this was an application by the New York Central and Hudson River Railroad Company for permission to discontinue passenger operation between Rochester and Windsor Beach on the line formerly owned by the Rome, Watertown and Ogdensburg. Such permission was granted by the Commission June 18, 1908, but the order then required that flagmen should be stationed at a number of crossings within the city of Rochester. October 19, 1914, the New York Central and Hudson River Railroad Company made further application for permission to discontinue the flagmen and in lieu thereof to restrict the movement of its trains to six miles per hour and carry on each train an extra man as a traveling flagman. March 2, 1915, an order was made in part granting and in part denying such petition. This order was quite specific as to the movement of trains, requiring them to stop before crossing each street except those where flagmen were retained, and also contained the following:

"7. For the protection of school children no movements except in cases of emergency shall be made between the hours of 8:00 and 9:00 A. M., 11:30 A. M. and 1:30 P. M. and 3:30 and 5:00 P. M."

All movements on this line are in the nature of switching movements, trains being hauled from Charlotte and cars dropped from place to place at industries and small yards along the line. Returning, cars are picked up at these points and taken to Charlotte. At the hearing that led to the order of March 2, 1915, there were many appearances in opposition to the withdrawal of the flagmen. Notice of the hearing on the present application, held in Rochester June 3, 1916, was given to all who appeared at the former hearing. Besides the New York Central Railroad Company, successor of the New York Central and Hudson River Railroad Company, there was no appearance except by the deputy corporation counsel and the alderman of one of the wards through which the line of track extends. It appeared that there have been

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Public Service Commission, Second District

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no accidents since the order of 1915 and no complaints as to its violation or as to dangerous conditions resulting therefrom, so that apparently it accomplished the object in view, of affording even better protection than had been afforded by flagmen. The present application is for a modification of the seventh paragraph above quoted so as to permit operation of trains at all hours on Saturdays, Sundays and other days when no schools are in session. It is claimed that the hours are so closely restricted that it is not always possible to perform the necessary work in any one interval, so that engines and crews must be held over until the next period for operation or the work left undone for a considerable period. The city officials appearing at the hearing expressed no substantial objection to such modification. Their complaint was that operations during the night and in the very early morning are accompanied by much noise, to the great disturbance of the neighborhood adjoining the tracks, which is chiefly a residence neighborhood. It appears that there is a regular morning movement starting at Charlotte at 4:30 A. M., and on occasions movements during earlier night time. The handling of ice and perishable freight seems to require such movements and these must necessarily be accompanied by more or less noise especially because of the frequent stopping and starting. The division superintendent promised at the hearing to give orders forbidding the use of the whistle except in emergency. This will undoubtedly afford some relief. The modification of the order sought by the company ought to give further relief as the early movement is at times required in order that it may be completed and the locomotive withdrawn from the section prior to 9:00 A. M. If the order is modified as proposed there will be some days, especially in summer, when it would seem that the starting of the movement might be deferred. It is therefore

Ordered, that paragraph 7 of the order of March 2, 1915, be and the same is amended to read as follows:

"7. For the protection of school children, no movements except in cases of emergency shall be made on days when any schools are in session, between the hours of 8:00 and 9:00 A. M., 11:30 A. M. and 1:30 P. M., and 3:30 and 6:00 P. M.

Public Service Commission, Second District

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In the Matter of the Petition of the WESTERN NEW YORK UTILITIES COMPANY, INC. (Formerly the A. L. Swett Electric Light and Power Company) under Section 89 of the Public Service Commissions Law, for Authority to Execute and Deliver a First Mortgage to Secure \$5,000,000 5 Per Cent Thirty-Year Gold Bonds, and to Issue Now \$700,000 of the Bonds, and for Annulment of Order Authorizing Another Mortgage and Bonds

Case No. 5471

(Public Service Commission, Second District, June 13, 1916)

Modification of previous order made in Case No. 692, July 29, 1914, so as to provide for the issuance of \$34,000 face value of certain gold bonds.

Similar modification made so as to cancel a previous order allowing the issuance of \$303,000 (face value) of an issue of \$2,000,000 of bonds thereunder.

The Western New York Utilities Company, Inc., made application for permission to execute and deliver to the New York Trust Company, as trustee, a deed of trust upon all its plant and property as of the 1st of June, 1916, to secure an issue of thirty-year gold bonds bearing interest of 5 per cent per annum to the amount of \$5,000,000 face value, and for authority to issue \$700,000 face value of its gold bonds under the said mortgage. Permission granted with the usual restrictions.

Petition filed March 14, 1916.

Report of division of capitalization dated May 5, 1916.

Report of gas engineer dated May 10, 1916.

Report of electrical engineer dated June 1, 1916.

Form of proposed mortgage filed June 9, 1916.

Final report of division of capitalization dated June 13, 1916.

Proposed mortgage in final form filed June 12, 1916.

Certified copy of minutes of board of directors authorizing execution of mortgage filed June 12, 1916.

BY THE COMMISSION.—Now, therefore, upon the foregoing record, ordered as follows:

1. That the order of this Commission heretofore entered in

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Case No. 692 on the 29th day of July, 1914, is hereby modified and amended to authorize the issuance of only \$34,000 face value of 5 per cent thirty-year gold bonds, the authorization in addition thereto to execute a mortgage for \$2,000,000 and to issue \$303,000 face value of bonds thereunder being hereby cancelled.

2. That the Western New York Utilities Company, Inc., is hereby authorized to execute and deliver to the New York Trust Company, as trustee, a corporation organized and existing under the laws of the State of New York, a certain indenture, deed of trust or mortgage upon all its plant and property, dated the 1st day of June, 1916, to secure an issue of thirty-year gold bonds, bearing interest at the rate of 5 per cent per annum, payable semi-annually on the first days of June and December in each year to the aggregate amount of \$5,000,000 face value, a copy of which has been filed with this Commission herein, and that the form of such indenture filed herein on the 12th day of June, 1916, and marked "Revised Exhibit A" is hereby approved, provided that said company shall have no right or authority to issue any bonds pursuant to the terms of said mortgage except as herein or hereafter authorized by this Commission.

3. That upon the execution and delivery of said indenture so authorized there shall be filed with this Commission a copy of the mortgage in the form in which it was executed and delivered, together with an affidavit by the president or other executive officer of the company, stating that the mortgage as executed and delivered is the same as that herein approved by this Commission.

4. That the Western New York Utilities Company, Inc., is hereby authorized to issue \$700,000 face value of its 5 per cent thirty-year gold bonds under the aforesaid mortgage.

5. That said bonds of the total face value of \$700,000 shall be sold for not less than 90 per cent of their face value and accrued interest to give net proceeds of at least \$630,000.

6. That said bonds of the face value of \$700,000 so authorized or the proceeds thereof to the amount of \$630,000 shall be used solely and exclusively for the following purposes, provided that such bonds or their proceeds may be used for the payment of the

Public Service Commission, Second District

following described obligations or the renewals thereof, or for the reimbursement of the treasury of the petitioner for any payments for the discharge of any of such obligations or their renewals:

(a) For the refunding of the following funded debt outstanding on December 31, 1915:

1. First mortgage 5 per cent bonds of the  
petitioner maturing August 1, 1933..... \$250,000

Less:

Acquired by company by purchase on Au-  
gust 1, 1912..... \$6,600

Retired by sinking fund provisions..... 19,900

26,500

Total..... \$223,500

2. Five per cent bonds of the Albion Power Company  
maturing September 1, 1919..... 74,500

3. Six per cent mortgage on the Brockport plant due  
on demand ..... 10,000

4. Five per cent mortgage on house at Albion matur-  
ing April 19, 1919..... 1,000

\$309,000

(b) For the discharge of bills payable outstanding at  
December 31, 1915, as set forth on pages 4 and 5  
of the petition herein..... 321,000

\$630,000

7. That if the said bonds of a total face value of \$700,000 herein authorized shall be sold at such price as will enable the company to realize net proceeds of more than \$630,000, no portion of the proceeds of such sale in excess of the last aforesaid sum shall be used for any purpose without the further order of this Commission.

8. That none of the said bonds herein authorized shall be hypothecated or pledged as collateral by the Western New York



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Utilities Company, Inc., unless any such hypothecation or pledge shall have been expressly approved and authorized by this Commission.

9. That the Western New York Utilities Company, Inc., shall for each six months' period ending December thirty-first and June thirtieth, file not more than thirty days from the end of such period a verified report showing:

(a) What bonds have been sold or otherwise disposed of during such period in accordance with the authority contained herein and the date of such sale or disposition.

(b) To whom such bonds were sold.

(c) What proceeds were realized from such sale.

(d) Any other terms and conditions of such sale.

(e) The amount expended in reasonable detail of the proceeds for each of the purposes specified herein during such period and stating to what account or accounts such expenditures have been charged.

Such reports shall continue to be filed until all of said bonds shall have been sold or disposed of and the proceeds expended in accordance with the authority contained herein, and if during any period no bonds were sold or disposed of or proceeds expended, the report shall set forth such fact.

10. That the authority contained in this order to issue bonds is upon the express condition that the petitioner accept and agrees to comply in good faith with the provisions hereof and before any bonds are issued pursuant hereto and within thirty days of the service hereof, the said company shall file with this Commission a satisfactory verified stipulation, duly authorized by its board of directors, accepting this order with all its terms and conditions and such order shall be void and of no force or effect until such stipulation shall have been filed as required herein.

Finally, it is determined and stated, That in the opinion of this Commission the money to be procured by the issue of said bonds herein authorized is reasonably required for the purposes specified in this order and that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

In the Matter of the Petition of DESPATCH HEAT, LIGHT AND POWER COMPANY, under Section 68 of the Public Service Commissions Law, for Permission to Construct in the Incorporated Village of Pittsford and in the Towns of Pittsford and Perinton, Monroe County, a Gas Plant Including Pipes and Appurtenances for Furnishing Gas to the Public for Light, Heat or Power and for Approval of Franchises Therefor Received from Municipal Authorities; the Franchises also Covering Electricity which Has Been Furnished in These Municipalities for Some Years by This Petitioner

Case No. 5545

(Public Service Commission, Second District, June 13, 1916)

Authority granted to a light, heat and power company to construct a gas plant in the incorporated village of Pittsford and in the towns of Pittsford and Perinton, Monroe county.

The local authorities of the village of Pittsford and the towns of Pittsford and Perinton, Monroe county, have granted to the Despatch Heat, Light and Power Company permission, under section 68 of the Public Service Commissions Law, to construct in the village and towns aforesaid a gas plant for furnishing gas to the public. This application is made for authorization for the construction of such plant and for the approval of the local consents. Permission granted with the usual restrictions.

BY THE COMMISSION.— The Despatch Heat, Light and Power Company seeks permission under section 68 of the Public Service Commissions Law to construct in the incorporated village of Pittsford and in the towns of Pittsford and Perinton, all in Monroe county, a gas plant for furnishing gas to the public and also for approval of franchises in the same municipalities for that purpose. The franchises are as follows:

1. Resolution of the board of trustees of the village of Pittsford passed October 18, 1906.
2. Resolution of the town board, signed also by the commissioner of highways of the town of Pittsford, November 1, 1905.
3. Resolution of the town board of the town of Perinton, passed December 28, 1905.

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Each of these franchises authorizes the construction and maintenance of wires, pipes and other conductors for electricity, gas and steam for light, heat and power purposes in the streets, avenues, parks and other public places of the village and towns respectively stated. The franchises for electricity have been in fact exercised since shortly after they were granted. It is now desired to lay gas mains and furnish gas in the village of Pittsford and in the two towns, particularly in the village of Pittsford and the village of East Rochester, lying partly in each town and which, since the granting of the franchises by the towns of Perinton and Pittsford, has been incorporated and in its incorporation assumed expressly the obligations and rights of an easement theretofore granted to the applicant by the proprietors of the land included in such corporation for the purposes specified in this petition. The Pittsford Light and Heat Company has since 1905 been furnishing acetylene gas in a portion of the village of Pittsford and its secretary and treasurer filed his affidavit to that effect and stating that there is no need for other gas supply within that village. At the hearing held, after due notice, in the city of Rochester, June 3, 1916, there was no appearance on behalf of said Pittsford Light and Heat Company and no appearance in opposition to the granting of the application. It appeared that May 17, 1916, the village board of the village of Pittsford passed a resolution purporting to revoke the franchise granted October 18, 1906, in so far as applied to the supplying of gas, but that on the 29th day of May, 1916, it passed a resolution rescinding the resolution of May 17. It further appeared that the acetylene plant of the Pittsford Company had deteriorated and is no longer sufficient to supply the needs of the village.

It is therefore determined and stated, That the construction of said plant and the exercise of said franchises are necessary and convenient for the public service and it is

Ordered: 1. That the permission and approval of the Commission be given to Despatch Heat, Light and Power Company, under section 68 of the Public Service Commissions Law, to construct, in the incorporated village of Pittsford and in the towns of Pittsford and Perinton, Monroe County, a gas plant including

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pipes and appurtenances for furnishing gas to the public for light, heat and power.

2. That the permission and approval of the Commission be given to said Despatch Heat, Light and Power Company to exercise the rights and privileges conferred by said franchises granted by the board of trustees of the village of Pittsford, October 18, 1906, by the town board and commissioner of highways of the town of Pittsford November 1, 1905, and by the town board of the town of Perinton December 28, 1905, copies whereof are on file with the papers in the application.

3. No poles, wires or other structures shall be placed upon, along or across any state or county highway without the consent of the State Commissioner of Highways.

In the Matter of the Petition, under Section 70 of the Public Service Commissions Law, of the DEPEW AND LANCASTER LIGHT, POWER AND CONDUIT COMPANY for Authority to Acquire \$5,000 (All) of the Capital Stock (Common) and \$7,000 Bonds of the Inter-Village Electric Corporation of the Incorporated Village of Hamburg, Erie County, and, under Section 69 of the Public Service Commissions Law, for Authority to Issue \$9,600 First Mortgage 5 Per Cent Forty-Year Bonds under an Existing Mortgage

Case No. 5590

(Public Service Commission, Second District, June 15, 1916)

**Acquisition of the common capital stock and \$7,000 of bonds of an electric corporation by another electric corporation.**

The Depew and Lancaster Light, Power and Conduit Company petitions for permission to acquire all of the common capital stock and \$7,000 bonds of the Inter-Village Electric Corporation of the village of Hamburg, Erie county, and for authority to issue \$9,600 first mortgage 5 per cent forty-year bonds under an existing mortgage. Permission granted with the usual restrictions.

BY THE COMMISSION.— Now, therefore, upon the foregoing record, ordered as follows:

1. That the Depew and Lancaster Light, Power and Conduit

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Company is hereby authorized to issue \$9,600 face value of its 5 per cent forty-year first mortgage gold bonds under a certain indenture, dated the 1st day of August, 1914, given to the Fidelity Trust Company of Buffalo, as trustee, to secure an authorized issue of a total face value of \$1,000,000.

2. That said bonds of the total face value of \$9,600 shall be sold for not less than 80 per cent of their face value and accrued interest to give net proceeds of at least \$7,680.

3. That said bonds of the face value of \$9,600 so authorized or the proceeds thereof shall be applied solely and exclusively towards the purchase and acquisition of the entire outstanding issue of \$5,000 common capital stock and \$7,000 face value of 5 per cent twenty-year first mortgage bonds of the Inter-Village Electric Corporation, which securities may be acquired and held provided the purchase price shall not exceed \$12,000, and further provided that the financial condition of the Inter-Village Electric Corporation at the time the securities are purchased shall appear in a balance sheet to be taken from the books of the corporation as of the date of said purchase, to be as favorable as appears in the balance sheet of the company of December 31, 1915, and an attested copy of such balance sheet of the date of purchase shall be promptly filed with this Commission as a part of the record in this case.

4. That if the said bonds of a total face value of \$9,600 herein authorized shall be sold at such price as will enable the company to realize net proceeds of more than \$7,680, no portion of the proceeds of such sale in excess of the last aforesaid sum shall be used for any purpose without the further order of the Commission.

5. That none of the said bonds herein authorized shall be hypothecated or pledged as collateral by the Depew and Lancaster Light, Power and Conduit Company unless any such pledge or hypothecation shall have been expressly approved and authorized by this Commission.

6. That the Depew and Lancaster Light, Power and Conduit Company shall for each six months' period ending December thirty-first and June thirtieth, file not more than thirty days from the end of such period a verified report showing:

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(a) What bonds have been sold or otherwise disposed of during such period in accordance with the authority contained herein, and the date of such sale or disposition.

(b) To whom such bonds were sold.

(c) What proceeds were realized from such sale.

(d) Any other terms and conditions of such sale.

(e) The amount expended of the proceeds for the purposes specified herein during such period, and stating to what account or accounts such expenditures have been charged.

Such reports shall continue to be filed until all of said bonds shall have been sold or disposed of and the proceeds expended in accordance with the authority contained herein, and if during any period no securities were sold or disposed of or proceeds expended the report shall set forth such fact.

7. That the company shall within thirty days of the service of this order advise the Commission whether or not it accepts the same with all its terms and conditions.

Finally, it is determined and stated, that in the opinion of the Commission the money be procured by the issue of said bonds herein authorized is reasonably required for the purposes specified in this order and that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

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In the Matter of the Application of the NASSAU AND SUFFOLK LIGHTING COMPANY under Section 69 of the Public Service Commissions Law, for Authority to Issue Additional First Mortgage Bonds

Case No. 4970

(Public Service Commission, Second District, June 15, 1916)

**Second amendatory order under an original order permitting an electric lighting company to issue additional first mortgage bonds.**

On July 1, 1915, an original order was entered herein, permitting the Nassau and Suffolk Lighting Company to issue \$429,000 of its 5 per cent thirty-year first mortgage bonds and \$140,200 of its common capital

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stock for purposes herein specified. Subsequently, under an amending order, the period during which the proceeds of the authorized securities could be used was extended one year. On the present application the time during which the proceeds of the securities authorized could be used was extended until December 1, 1916, with the usual restrictions.

BY THE COMMISSION.— Under date of July 1, 1915, an order was entered in this proceeding authorizing the Nassau and Suffolk Lighting Company to issue \$429,000 of its five per cent thirty-year first mortgage bonds and \$140,200 par value of its common capital stock, and to use the proceeds of such securities for certain purposes in said order prescribed. The order further provided that the proceeds of such securities could be used only for expenditures made before December 1, 1915, on the specified additions, betterments and extensions for which such securities were therein authorized. By verified reports filed herein it appears that on December 31, 1915, of the stock and bonds then authorized to be issued and sold there remained unissued \$140,200 of stock and \$131,000 of bonds, and that of the proceeds of sales of stock and bonds which had actually been issued and sold there remained unused and in hand as of the last mentioned date the sum of \$178,808.69. Under date of February 12, 1916, the corporation petitioned the Commission to extend the period, during which the proceeds of the securities authorized could be used, one year from December 1, 1915.

In accordance with the requirements of ordering clause No. 6 of the aforesaid order, the accounts and properties of the petitioner have been examined by the representatives of the Commission and the tentative report of the results of such examination, a copy of which has been placed in the hands of the applicant corporation, was considered at the hearing held on June 15, 1916. At its request the petitioner has been allowed thirty days from the date hereof to consider said report and to file with this Commission any reply it may desire to make to said report; pending the receipt of any such reply and until the expiration of the interval mentioned, the determination by the Commission of all questions relative to the accounting by the petitioner for the expenditures of the proceeds of securities heretofore and herein

authorized and the expenditures heretofore made and charged to fixed capital since the organization of the petitioner is reserved. Upon the foregoing, and upon the agreement of the petitioner as entered in the minutes to comply with all the requirements of the orders of this Commission in this matter, and especially the order of July 1, 1913, and of this amendment thereof, ordered as follows:

1. That ordering clause No. 12 of the order herein dated July 1, 1915, be and it hereby is amended to read as follows:

“ 12. That the proceeds of stocks and bonds herein authorized can be used only for expenditures made before December 1, 1916, on the specified additions, betterments and extensions for which such proceeds are herein authorized.”

2. That all questions relative to the accounting by the petitioner for the expenditure of the proceeds of securities herein authorized and of the expenditures heretofore made and charged to fixed capital since the organization of the petitioner be and they hereby are reserved for future determination by this Commission.

3. That the Nassau and Suffolk Lighting Company shall within twenty days after the receipt of this order file the report required herein of the sale of securities and disposition of the proceeds thereof during the period from December 1, 1915, to May 31, 1916, and shall within ten days after the first of each of the calendar months after the date of this order file for the preceding month a report verified by its president and its principal accounting officer showing:

(a) What securities have been sold or otherwise disposed of during such period in accordance with the authority contained herein and the date of such sale or disposition.

(b) To whom such securities were sold.

(c) What proceeds were realized from such sale.

(d) Any other terms and conditions of such sale.

(e) In detail the amount expended for each of the purposes specified herein during the period covered by each of such reports respectively of the proceeds of securities herein authorized, and



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such report shall show for each of said purposes to what account or accounts under the uniform system of accounts for gas corporations the expenditures for such purposes have been charged, and giving all the details of any credits to fixed capital in connection with such expenditures, which aforesaid detail of expenditures of proceeds shall include verified copies of all vouchers with supporting invoices, payrolls, material warrants and all other evidences of the actual disbursements of such proceeds, including verified copies of journal entries with a full explanation of the necessity therefor, reflecting and affecting the disbursements of the proceeds of the aforesaid securities.

In reporting under subdivisions (b) and (c) of this clause there shall be further shown the expenditures to the beginning of the period reported on and a total showing the expenditures to the end of the period.

4. That the company shall within thirty days of the service of this order advise the Commission whether or not it accepts the same with all its terms and conditions.

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In the Matter of the Petition of the ELMIRA WATER, LIGHT AND RAILROAD COMPANY, under Sections 55 and 69 of the Public Service Commissions Law for Authority to Issue \$617,000 in First Consolidated Mortgage 5 Per Cent Fifty-Year Bonds, \$850,000 7 Per Cent Cumulative First Preferred Capital Stock, and \$317,000 5 Per Cent Cumulative Second Preferred Capital Stock

Case No. 4212

(Public Service Commission, Second District, June 15, 1916)

Permission sought by water, light and railroad company for leave to issue consolidation bonds, first preferred capital stock and second preferred capital stock.

The original petition herein was filed April 1, 1916, and on April 22, 1916, the Elmira Water, Light and Railroad Company was authorized to issue certain consolidated mortgage bonds, first preferred stock and second

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preferred stock under specific restrictions. From the verified reports submitted by petitioner herein, these securities have been disposed of and account made of the proceeds. As the company is now merged with the Elmira Transmission Corporation, and has secured also the Elmira and Seneca Lake Traction Company, case closed on the record and transferred to Case No. 5357.

Petition filed April 1, 1914.

Hearing held April 15, 1914.

Stipulation filed April 18, 1914.

Detailed analysis of fixed capital filed October 12, 1914.

Analysis of work in progress filed October 12, 1914.

Inventory of tangible property as of June 30, 1914, of Elmira Transmission Corporation and Elmira and Seneca Lake Traction Company filed January 21, 1915.

Report of gas engineer dated July 2, 1915.

Report of electrical engineer dated August 12, 1915.

Report of transportation engineer dated August 16, 1915.

Reports of division of capitalization dated August 20, and September 16, 1915, and other reports, memoranda, etc., transferred from Case 2844.

By THE COMMISSION.—By order herein dated April 22, 1914, the Elmira Water, Light and Railroad Company was authorized to issue \$617,000 face value of its 5 per cent fifty-year first consolidated mortgage bonds and \$1,167,000 of its capital stock, \$850,000 of which was 7 per cent cumulative first preferred and \$317,000 5 per cent cumulative second preferred. The bonds were to be sold for not less than 85 per cent of their face value and accrued interest and the stock for not less than its par value and the proceeds were to be used for certain specified purposes. In connection with that application the petitioner was to do certain things including the correction of its balance sheet accounts, more particularly its fixed assets accounts and its reserve for accrued amortization, to the facts which were to be determined by the Commission. From the verified reports which the petitioner has filed in this case all of the securities have been disposed of and their proceeds accounted for. The other requirements above referred to of the order herein of April 22, 1914, have

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not been satisfied and as similar adjustments in the accounts of the Elmira and Seneca Lake Traction Company are required by order of even date herein in connection with an application in Case No. 5357 filed by the Elmira Water, Light and Railroad Company for permission to merge the Elmira Transmission Corporation and to acquire the assets and liabilities of the Elmira and Seneca Lake Traction Company these unsatisfied provisions of the order herein of April 22, 1914, are transferred to that last named case.

Now, therefore, upon the foregoing record, ordered, That the requirements of the order herein dated April 22, 1914, exclusive of those referring to the issuance of securities and the disposition of proceeds, and more particularly those contained in the stipulation recited in the aforesaid order and clauses 10, 11, 12 and 13 thereof, are hereby transferred to Case No. 5357 and this case is closed on the records of the Commission.

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In the Matter of the Joint Petition of ELMIRA WATER, LIGHT AND RAILROAD COMPANY, ELMIRA TRANSMISSION CORPORATION and ELMIRA AND SENECA LAKE TRACTION COMPANY: (1) for Authority to the Water Company to Issue First and Second Preferred Capital Stock, and Mortgage Bonds; (2) for Authority to the Water Company to Buy All of the Capital Stock of the Transmission Corporation and to Merge the Transmission Corporation; (3) for Authority to the Water Company to Acquire the Property and Franchises of the Traction Company and to the Traction Company to Transfer Them

Case No. 5357

(Public Service Commission, Second District, June 15, 1916)

**Merger of Elmira Transmission Corporation and the Elmira Water, Light and Railroad Company and the Elmira and Seneca Lake Traction Company.**

The original petition herein was filed December 20, 1915, and the final report of the division of capitalization was dated June 14, 1916. The other reports and certificates filed in Case No. 4212 as listed June 14, 1916.

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BY THE COMMISSION.—Now, therefore, upon the foregoing record, ordered as follows:

1. That the Elmira and Seneca Lake Traction Company is hereby authorized to transfer and sell all of its property and franchises subject to its liabilities to the Elmira Water, Light and Railroad Company, and this Commission hereby permits and approves of the transfer to and the acquisition by the Elmira Water, Light and Railroad Company of all the property and franchises of the Elmira and Seneca Lake Traction Company subject to its liabilities.

2. That the Elmira Water, Light and Railroad Company is hereby authorized to acquire and hold the five shares each of the par value of \$100, aggregating a total par value of \$500, of the outstanding capital stock of the Elmira Transmission Corporation, being the entire outstanding capital stock of that company, for the sum of \$500.

3. That this Commission hereby consents that the Elmira Water, Light and Railroad Company may merge the Elmira Transmission Corporation.

4. That the Elmira Water, Light and Railroad Company is hereby authorized to issue \$100,000 face value of its 5 per cent fifty-year first consolidated mortgage gold bonds under a certain indenture, dated September 1, 1906, given to the New York Trust Company, as trustee, to secure an authorized issue of a total face value of \$5,000,000.

5. That the Elmira Water, Light and Railroad Company is hereby authorized to issue \$325,000 par value of its capital stock, \$125,000 of which shall be 7 per cent cumulative first preferred and \$200,000 5 per cent cumulative second preferred.

6. That none of the said bonds of the total face value of \$100,000 shall be sold for less than 92½ per cent of their face value and accrued interest to give net proceeds of at least \$92,500.

7. That none of the said stock of the total par value of \$325,000 shall be sold for less than its par value to give net proceeds of at least \$325,000.

8. That said bonds and stock of the total face and par value

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of \$425,000 so authorized or the proceeds thereof to the amount of at least \$417,500 shall be used solely and exclusively for the following purposes:

- (a) For the discharge of indebtedness of the Elmira Water, Light and Railroad Company outstanding at October 31, 1915, or the renewals thereof, as follows:

Bills payable .....	\$299,805 00	
Accounts payable .....	102,309 49	
		\$402,114 49

- (b) For the discharge of bills payable of the Elmira Transmission Corporation outstanding at October 31, 1915, or their renewals..... 55,000 00

- (c) For expenses incident to sale of stock herein authorized including expense of selling, legal and accounting services and examinations, provided that the disbursements for these purposes shall be charged to a suspense account to be amortized before July 1, 1919, by charges through the prescribed income deduction account "other contractual deductions from income"... 16,250 00

- (d) For new construction from October 31, 1915, as detailed in Exhibit G attached to the petition herein . . . . . 63,570 04

\$536,934 53

Amount unprovided for..... \$119,434 53

in so far as the same may be applicable, provided:

(1) That such bonds and stock or the proceeds thereof shall be applied on such new construction summarized in subdivision (d) hereof only in so far as the same is a real increase in the fixed capital of the petitioner and not a replacement of any part of such fixed capital or substitution for wasted capital or other loss properly chargeable to income in accordance with the definitions

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contained in the uniform systems of accounts for gas, electrical and street railroad corporations adopted by this Commission.

(2) That there shall not be expended for any of such purposes a sum in excess of the amount set opposite such purpose.

(3) That there shall be no charges to fixed capital on account of engineering services in connection with the construction provided for in subdivision (d) hereof unless such engineering services shall have been rendered either by other than the regular officers and employees of the corporation, or in a proper case where such services may have been rendered by certain of such officers or employees, under an express assignment to such construction or improvement work.

(4) That if there shall be required for any of the aforesaid purposes, subject to the limitations herein contained, a sum less than the amount set opposite thereto, no portion of said amount over the actual cost thereof so required shall be used for any purpose without the further order of this Commission.

(5) That the unit prices contained in Exhibit G of the petition are not intended to be and must not be construed by the petitioner as having been determined upon by this Commission as the actual cost of the work to be done and thus properly chargeable to fixed capital, but are intended and shall be construed only to be a present estimate of the probable cost of such work, the cost of which must be actual expenditures made as defined by the Commission's uniform systems of accounts for gas, electrical and street railroad corporations.

9. That if the said securities of the total face and par value of \$425,000 herein authorized shall be sold at such price as will enable the company to realize net proceeds of more than \$536,934.53, no portion of the proceeds of such sale in excess of the last aforesaid sum shall be used for any purpose without the further order of the Commission.

10. That none of the said bonds herein authorized shall be hypothecated or pledged as collateral by the Elmira Water, Light and Railroad Company unless any such pledge or hypothecation shall have been expressly approved and authorized by the Commission.

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11. That the Elmira Water, Light and Railroad Company shall for each six months period ending December thirty-first and June thirtieth file not more than thirty days from the end of such period a verified report showing:

(a) What securities have been sold or otherwise disposed of during such period in accordance with the authority contained herein and the date of such sale or disposition.

(b) To whom such securities were sold.

(c) What proceeds were realized from such sale.

(d) Any other terms and conditions of such sale.

(e) With respect to subdivisions (a) to (c) inclusive of ordering clause No. 8 herein, there shall be shown the amount expended in reasonable detail of the proceeds for the purposes specified therein during such period and stating to what account or accounts such expenditures have been charged.

(f) With respect to subdivision (d) of ordering clause No. 8 herein, there shall be shown;

(1) In detail the amount expended during such period of the proceeds of the securities herein authorized, and to what account or accounts under the uniform systems of accounts for gas, electrical and street railroad corporations the expenditures for such purposes have been charged, giving all details of any credits to fixed capital in connection with such expenditures.

(2) A summary of the expenditures for such purposes during the period covered by the report.

(3) A summary showing the distribution by accounts provided in the uniform systems of accounts of the expenditures during such period.

In reporting under sections (2) and (3) of subdivision (f) of this clause there shall be further shown the expenditures of the proceeds of the securities herein authorized to the beginning of the period reported on and a total showing such expenditures to the end of the period, together with a statement of the balances in the fixed capital accounts as of the beginning and ending of such period.

Such reports shall continue to be filed until all of said securities

shall have been sold or disposed of and the proceeds thereof accounted for in accordance with the authority contained herein, and if during any period no securities were sold or disposed of or proceeds expended, the report shall set forth such fact.

12. That the assets and liabilities of the Elmira Transmission Corporation if merged, and the assets and liabilities of the Elmira and Seneca Lake Traction Company, if the property of said company shall be acquired, shall be taken on the books of the Elmira Water, Light and Railroad Company by journal entries which are in accord with those contained in the final report of the division of capitalization herein, dated June 14, 1916, modified by legitimate business transactions of such corporations since October 31, 1915.

13. That the inventory and appraisal of the tangible property of the Elmira Water, Light and Railroad Company as of June 30, 1914, filed January 21, 1915, in accordance with the requirements of ordering clause No. 11 of the order dated April 22, 1914, entered in Case No. 4212, modified as indicated in the final report herein of the division of capitalization, dated June 14, 1916, is hereby approved, and the company is directed to spread this inventory and appraisal upon its books by means of entries substantially in conformity with those contained in the final report of the division of capitalization, giving due consideration to the subsequent changes in its property accounts.

14. That the sum of \$2,531,258.01 herein authorized to be debited to the account "intangible suspense to be amortized" shall be amortized at the rate of \$20,000 during each of the next five calendar years, and thereafter at the rate of \$30,000 during each calendar year, by means of debits of such amounts to the account "other contractual deductions from income," provided that when this account has been amortized to \$1,000,000, the Elmira Water, Light and Railroad Company shall make application to this Commission for a determination of the disposition of such balance.

15. That the Fixed Capital accounts of the Elmira Water, Light and Railroad Company as corrected by the journal entries, which the petitioner has been herein directed to make, having



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been carefully checked, and being as nearly as may be ascertained a true statement of the same, the separation of such accounts between fixed capital installed prior to December 31, 1908, and fixed capital installed since December 31, 1908, is no longer necessary and the petitioner herein shall debit and credit all entries in connection with fixed capital to the appropriate fixed capital accounts prescribed in the uniform systems of accounts for gas, electrical and street railroad corporations covering expenditures for fixed capital installed since December 31, 1908.

16. That the uniform systems of accounts for gas, electrical and street railroad corporations are hereby amended in their application to the accounts of the Elmira Water, Light and Railroad Company in so far as is necessary so that all charges on account of retirements of fixed capital shall be charged to the account "accrued amortization of capital" heretofore created and as maintained by credits to the same and charges to "operating expenses—general amortization" as provided in the uniform systems of accounts applicable to said corporation.

17. That within sixty days from the service of this order the petitioners herein shall file complete statements duly verified by their respective secretaries or other executive officers, showing full particulars of the merger by the Elmira Water, Light and Railroad Company of the Elmira Transmission Corporation and the acquisition of the property and franchises of Elmira and Seneca Lake Traction Company (if the same be acquired) including:

(a) Details of the changes in the accounts of the Elmira Transmission Corporation and Elmira and Seneca Lake Traction Company in so far as they affect the condition of their property and assets from October 31, 1915, to the date of the actual transfer of such property and assets to the Elmira Water, Light and Railroad Company.

(b) Detailed balance sheets of the Elmira Transmission Corporation and Elmira and Seneca Lake Traction Company as of the date of the transfer of their property and assets to the Elmira Water, Light and Railroad Company.

(c) Particulars of the entries made upon the books of the Elmira Water, Light and Railroad Company reflecting the acquisition of the assets and liabilities of the Elmira Transmission Corporation and Elmira and Seneca Lake Traction Company.

(d) A detailed balance sheet of the Elmira Water, Light and Railroad Company as of the date of the acquisition by that company of the assets and liabilities of the Elmira Transmission Corporation and Elmira and Seneca Lake Traction Company.

18. That none of the expenses incurred by the Elmira Water, Light and Railroad Company on account of the acquisition of the assets and liabilities of the Elmira Transmission Corporation and Elmira and Seneca Lake Traction Company shall be charged to fixed capital.

19. That the proposed journal entries contained in the final report of the division of capitalization in this proceeding, dated June 14, 1916, such entries being listed in the following appendices of said report: Appendix "A," journal entries Nos. 1 to 7 inclusive; Appendix "B," journal entries Nos. 1 to 3 inclusive; Appendix "D," journal entries Nos. 7 and 8; or entries affecting the same adjustments, shall be entered upon the books of the Elmira Water, Light and Railroad Company and the Elmira and Seneca Lake Traction Company, and that within sixty days from the date of this order verified proof shall be submitted to the Commission that such entries have been made, and within thirty days after the consummation of the merger of the Elmira Transmission Corporation and the acquisition of the assets and liabilities of the Elmira and Seneca Lake Traction Company verified proof shall be submitted that the remaining journal entries set forth in the final report of the division of capitalization, or entries effecting the same adjustments have been made.

20. That the authority contained in this order to issue securities, to merge and to transfer and acquire property, etc., is upon the express condition that the petitioners accept and agree to comply in good faith with the provisions hereof and before any securities are issued pursuant hereto or other authority exercised

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hereunder and within thirty days of the service hereof the said companies shall file with this Commission satisfactory verified stipulations duly authorized by their boards of directors, accepting this order with all its terms and conditions, and such order shall be void and of no force or effect until such stipulations shall have been filed as required herein.

Finally, it is determined and stated, That in the opinion of this Commission the money to be procured by the issue of said securities herein authorized is reasonably required for the purposes specified in this order and that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income, except the \$16,250 allowed for expenses incident to the sale of stock.

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In the Matter of the Petition of THE DEPEW AND LANCASTER LIGHT, POWER AND CONDUIT COMPANY, under Section 68 of the Public Service Commissions Law, for Permission to Construct a Light Plant, Including Poles, Wires, Conduits and Appurtenances for Furnishing and Transmitting Electricity for Light, Heat or Power to the Public in the Town of Elmira, Erie County, and for Approval to Exercise the Rights and Privileges under a Franchise Therefor Received from the Town

Case No. 5521

(Public Service Commission, Second District, June 20, 1916)

**Application of an electric light, power and conduit company to extend its lines into a new district.**

The petition herein was filed on April 8, 1916, for permission to extend the petitioner's plant, including poles, wires, conduits and appurtenances, into the town of Elma, Erie county, and for approval of the local franchise granted by the town. Permission granted with the usual restrictions.

BY THE COMMISSION.—The petitioner, the Depew and Lancaster Light, Power and Conduit Company, filed its petition in this proceeding on the 8th day of April, 1916, for permission

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to construct, in the town of Elma, Erie county, an electric plant, including poles, wires, conduits and appurtenances, for distributing and furnishing electricity for light, heat and power to the said town and the inhabitants thereof, and for approval of the exercise of the rights and privileges under a franchise therefor received from said town; and thereafter a notice was duly published in accordance with the rules of this Commission for all persons knowing any reason why said petition should not be granted, to file the same with the secretary of the Commission, on or before the 29th day of April, 1916; and proof of the publication of said notice having been duly filed with the Commission, and a hearing having been duly held herein by the Commission in the city of Buffalo, on the 9th day of June, 1916, at which hearing Mr. Elton H. Beals, of the firm of Strebel, Corey, Tubbs & Beals, appeared as counsel on behalf of the petitioner, and no one appearing in opposition thereto; and certain proofs and proceedings having been thereupon taken and had whereby it satisfactorily appears that the petitioner is a domestic corporation and is desirous of constructing and operating its electric distribution plant in accordance with the said franchise therefor, dated December 18, 1916, and granted by the town board and superintendent of highways of the town of Elma, Erie county, and to construct, maintain and operate all necessary poles, wires, conduits and appurtenances in, through, upon, under and across all the streets, alleys, highways and public ways of said town of Elma, for the purpose of using, distributing and furnishing electricity for light, heat and power to the said town and the inhabitants thereof; and the said franchise having been presented to and filed with the Commission at said hearing;

And from all such papers, proofs and proceedings, it being hereby determined that the construction of said electric light plant, and the exercise of said franchise therefor, are necessary and convenient for the public service; it is therefore ordered:

1. That, pursuant to the provisions of section 68 of the Public Service Commissions Law, permission and approval are hereby given to the Depew and Lancaster Light, Power and Conduit

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Public Service Commission, Second District

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Company to construct, maintain and operate the said electric plant, and all necessary poles, wires, cables, conduits, subways, appliances and structures in, through, upon, under and across all of the streets, alleys, highways and public ways of the said town of Elma for the purpose of using, distributing and furnishing electricity for light, heat and power to the said town of Elma and the inhabitants thereof, as specifically provided in said franchise.

2. That permission and approval are hereby given to the said the Depew and Lancaster Light, Power and Conduit Company to exercise all the rights and privileges conferred by the said franchise, so granted by the town board and superintendent of highways of the town of Elma, Erie county, on the said 18th day of December, 1915, subject to and in accordance with all the terms, conditions, limitations and restrictions of said franchise.

3. No poles, towers, wires, cables, conduits or other structures herein authorized shall be placed over or across any state or county highway without first obtaining the consent of the State Commission of Highways.

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In the Matter of the Joint Petition, under Section 70 of the Public Service Commissions Law, of ARNOLD C. DICKINSON AND CHARLES P. DICKINSON, as to Transfer of Franchises of an Electric Plant in the Incorporated Village of Rosendale, and the Town of Marbletown, Ulster County

Case No. 5541

(Public Service Commission, Second District, June 20, 1916)

Transfer of an electric plant at Rosendale, Ulster county, from one individual to another.

Under a franchise granted by the village of Rosendale in 1906, and by the town of Marbletown, in which town the said village is located, in 1907, Arnold C. Dickinson has been supplying electric current both in the village and in the said town. Permission is now asked by him to be allowed to transfer to his father, Charles P. Dickinson, the petitioner's rights under the franchises. Permission granted with the usual restrictions.

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BY THE COMMISSION.— It appearing that Arnold C. Dickinson, one of the petitioners herein, has been furnishing and distributing electric current in the incorporated village of Rosendale and the town of Marbletown, Ulster county, N. Y., under franchises originally granted on August 31, 1906, by the village and on April 13, 1907, by the town, copies of which said franchises are annexed to the petition herein; and it appearing further (for reasons fully set forth at a public hearing on this petition held on the 24th day of May, 1916) that the said Arnold C. Dickinson desires to transfer to Charles P. Dickinson, his father, his rights, title and interests in, to and under the said franchises from the incorporated village of Rosendale and town of Marbletown; and the Commission being of the opinion that, for the reasons so presented, its permission and approval to such transfer should be granted; it is, hereby

Ordered, That the permission and approval of the Commission be, and it hereby is, given to the said Arnold C. Dickinson to transfer and convey the said franchises granted by the village of Rosendale on August 31, 1906, and by the township of Marbletown on April 13, 1907, and all the rights, title and interests of the said Arnold C. Dickinson in, to and under the said franchises, to the said Charles P. Dickinson, and that the permission and approval of this Commission be, and it hereby is, given to the said Charles P. Dickinson to accept the transfer of the aforesaid franchises from the said Arnold C. Dickinson, and to exercise the same pursuant to the provisions of sections 68 and 70 of the Public Service Commissions Law.

It is further ordered, That this order is not intended, and shall not be construed, to authorize any construction work in or upon any state or county highway unless and until the consent to and approval of such construction work shall have first been duly given by the State Commissioner of Highways.

It is further ordered, That the said Charles P. Dickinson shall file with the Commission within thirty days from the entry of this order his acceptance of the provisions of this order.

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Public Service Commission, Second District

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Petition of NEW YORK STATE RAILWAYS, under Section 53, Public Service Commissions Law, for Permission to Construct Extensions of its Electric Railroad in the City of Utica and for Approval of the Exercise of a Franchise Therefor Received from the City and, under Section 98 Railroad Law, as to Crossing the West Shore Railroad

Case No. 5558

(Public Service Commission, Second District, June 21, 1916)

Application by a railway company for approval of certain franchises granted to it by the local authorities in the city of Utica.

Application made for the construction by the New York State Railways of a single-track extension of the electric line of the petitioner in the city of Utica, along James street and along Neilson street, together with certain connections. Permission granted with the usual restrictions.

BY THE COMMISSION.—A petition, under section 53 of the Public Service Commissions Law, having been filed with this Commission by New York State Railways for permission to construct extensions of its electric railroad in the city of Utica on streets hereinafter named and for approval of the exercise of a franchise therefor received from the city, and, under section 98 of the Railroad Law, for a determination as to how the James street extension shall cross the West Shore Railroad, lessor; and a public hearing on said petition after due notice having been held by this Commission at which Kernan & Kernan appeared for petitioner, George H. Walker appeared for the New York Central Railroad Company, A. M. Dickinson appeared for the city of Utica, and G. E. Dennison appeared for property owners in opposition; and it appearing that the company has filed in the proper record offices a certificate of extension of its railroad covering this proposed construction and this Commission determining from the evidence at the hearing that such construction and exercise of franchise is necessary and convenient for the public service and

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that the crossing of the West Shore Railroad may properly, under the circumstances, be allowed to be made at grade, it is ordered:

1. That this Commission, under section 53 of the Public Service Commissions Law, hereby permits and approves construction by New York State Railways of a single track extension of its electric railway in the city of Utica, from the ending of its present railway on James street, along James street, easterly, about 2,200 feet to a point about 120 feet east of the easterly side of Neilson street, to be connected with the present track on Elm street by a single track curve at the corner of Elm and James streets, and a single track extension of its railway on Neilson street commencing at a point about 110 feet north of the northerly side of James street and extending southerly along Neilson street and connecting with the proposed track on James street by a curve to the east and a curve to the west at the intersection of James and Neilson streets, with necessary connections, switches, sidings, curves, etc., said extensions to be operated by the single overhead electrical trolley system of motive power; and hereby permits and approves the exercise of a franchise for such construction granted to said company by the common council of said city April 5, 1916, and approved by the mayor of said city April 5, 1916, a copy of which franchise, certified by J. P. Bannigan, clerk of the city of Utica, to be a true copy, is filed with this Commission with the papers in this case.

2. That this Commission, under section 98 of the Railroad Law, hereby determines that said extension on James street shall cross at grade with a single track the West Shore Railroad (leased to and operated by the New York Central Railroad Company) at a point where the West Shore Railroad, double track, now crosses James street at grade, and that the expense of such crossing and its manner and protection shall be as stated in an agreement between New York State Railways and the New York Central Railroad Company, a copy of which is applicants' Exhibit No. 3 in this case.



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Public Service Commission, Second District

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In the Matter of the Petition of the JAMESTOWN LIGHTING AND POWER COMPANY for Permission to Construct an Electric Plant in the Village of Falconer, and for Approval of Exercise of Rights and Privileges under a Franchise

Case No. 5582

(Public Service Commission, Second District, June 21, 1916)

**Application of Jamestown Lighting and Power Company to extend its line.**

The Jamestown Lighting and Power Company, the petitioner herein, seeks permission to construct its electrical plant, including poles, wires, conduits and appurtenances, in the village of Falconer, Chautauqua county, and for approval of certain local franchises granted in connection therewith. Permission granted and the local franchises approved.

By THE COMMISSION.—The petitioner, Jamestown Lighting and Power Company, filed its petition in this proceeding on the 20th day of May, 1916, for permission to construct its electrical plant, including poles, wires, conduits and appurtenances for transmitting and furnishing electricity in the village of Falconer, Chautauqua county, and for approval of the exercise of a franchise to use streets, highways and public places therefor received from the president and board of trustees of said village and dated April 20, 1916; thereafter a notice was duly published in accordance with the rules of this Commission for all persons knowing any reason why said petition should not be granted to file the same with the secretary of the Commission on or before the 10th day of June, 1916, and proof of the publication of said notice having been duly filed, and a hearing having been duly held herein by the Commission in the city of Buffalo on the 16th day of June, 1916, at which hearing Mr. C. J. Lipp, the secretary and treasurer of the petitioner, appeared in its behalf, and no one appearing in opposition thereto; and certain proofs and proceedings having been thereupon taken and had whereby it satisfactorily appears that the petitioner is a domestic corporation and

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is now operating its electric plant and plants in the city of Jamestown, the village of Celeron, the town of Ellicott and that portion of the town of Busti between the city of Jamestown and the village of Falconer, and is desirous of extending its service and constructing and operating its electrical distribution plant in accordance with the said franchise therefor, received from the authorities of the village of Falconer, and dated April 20, 1916, and to construct, maintain and operate all necessary poles, wires, conduits and appurtenances in, through, upon, under and across all of the roads, streets, highways, alleys and public places of the said village of Falconer, Chautauqua county, for the purpose of using, distributing and furnishing electricity for light, heat and power to the said village of Falconer and the inhabitants thereof; and the said franchise having been presented to and filed with the Commission at said hearing;

And from all of such papers, proofs and proceedings, it being hereby determined that the construction of said electrical plant, and the exercise of said franchise therefor, are necessary and convenient for the public service; it is therefore ordered:

1. That permission and approval are hereby given to Jamestown Lighting and Power Company to construct, maintain and operate the said electrical plant and all necessary poles, wires, conduits and appurtenances in, through, upon, under and across all of the roads, streets, highways, alleys and public places in the said village of Falconer, for the purpose of transmitting electric power in and through said village, for the purpose of using, distributing and furnishing electricity for light, heat and power to the said village of Falconer, and the inhabitants thereof, as specifically provided in said franchise.

2. That permission and approval are hereby given to the said Jamestown Lighting and Power Company to exercise all the rights and privileges conferred by the said franchise so granted by the said president and board of trustees of the village of Falconer on the 20th day of April, 1916, subject to and in accordance with all the terms, conditions, limitations and restrictions of said franchise.

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3. No poles, towers, wires, cables or other structures herein authorized shall be placed over or across any state or county highway without first obtaining the consent of the State Commissioner of Highways.

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In the Matter of the Petition of THE LONG ISLAND RAILROAD COMPANY under Section 91 of the Railroad Law for the Discontinuance of the Riverhead Road and Main Road Highway Grade Crossings of Its Railroad in the Town of Southampton, Suffolk County, and the Construction of New Pieces of Highway and One New Crossing at Grade

Case No. 4982

(Public Service Commission, Second District, June 26, 1916)

Correction of error in a description contained in the order of the Commission granted herein on June 6, 1916.

In the order in question the highway crossing herein ordered to be closed was described in paragraph 4 of the order as "westerly," instead of easterly, making a difference of 10,500 feet each way. Order corrected.

BY THE COMMISSION.—WHEREAS, Through typographical errors in the order of the Commission hereinunder date of June 6, 1916, the highway crossing therein ordered to be closed was described in paragraph four of said order as "located at a point about 10,500 feet westerly of the Southampton station," instead of "at a point 10,500 feet easterly of the West Hampton station," as it properly should have been described, it is

Ordered: That the said order of June 6, 1916, be and it is hereby amended so that the complete order shall read as follows:

In the town of Southampton the Long Island railroad is crossed at grade by two unimportant highways known as the Riverhead road and the Main Country road, located about 10,000 and 10,500 feet, respectively, east of the West Hampton station. The Main Country road crosses the railroad at a very sharp skew, and the

## Public Service Commission, Second District

Riverhead road crosses the railroad more nearly at right angles, the two roads forming a junction with each other at a point about 220 feet south of the railroad. It is proposed to close the Main Country road crossing and to construct a new road north of and parallel to the railroad from the Main Country road to the Riverhead road.

It is further proposed to abandon a part of the Riverhead road north of the track, from its junction with the new road northerly, a distance of about 1,080 feet, and substitute therefor a new road running in a northerly and southerly direction, intersecting the proposed new road north of and parallel to the tracks about at a point nearly opposite the old or the Main Country road crossing.

A hearing on this application was held by the Commission at Centre Moriches May 25, 1916, at which C. L. Addison and J. R. Savage, respectively assistant to the president and chief engineer, appeared for the Long Island Railroad Company; H. T. Tuthill from the State Commission of Highways; Frank Downs, town superintendent of highways; Peter E. Nostrand, county superintendent of highways; and Erastus F. Post, property owner, in person; at which time due proof of publication of the notice of this hearing and of personal service of such notice on all interested property owners as prescribed by the statute was made. There was no objection to the granting of the application, and the Commission has accordingly determined that the public safety requires that the petition be granted; and therefore

Ordered, That the Main Country road grade crossing of the Long Island railroad in the town of Southampton, Suffolk county, located at a point about 10,500 feet easterly of the West Hampton station, be closed and discontinued and that the travel be diverted therefrom to the Riverhead road by means of a new highway to be constructed north of, parallel to, and distant approximately 110 feet from the existing railroad track; and that another new road intersecting the said new road parallel to the railroad be constructed in a northerly direction intersecting the existing Riverhead road at a point about 1,160 feet from the railroad track measured along said new road.

The roadway on both of the new highways herein required to

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be laid out shall be improved with a cinder surface to the satisfaction of the local town authorities and of this Commission.

The alignment and location of the new roads herein ordered to be constructed are shown upon plan dated February 3, 1916, on file with this Commission; the said plan for further identification being marked "Public Service Commission, Second District, May 25, 1916, Applicants Ex. No. 1."

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In the Matter of the Complaint of JAMES O. MOORE against THE  
PAVILION NATURAL GAS COMPANY, Asking that Natural Gas  
Main Be Extended to His Farm in the Town of Leicester

Case No. 5196

(Public Service Commission, Second District, June 26, 1916)

**Provision of statute requiring natural gas corporation to furnish service in certain cases.**

**Remedy where the corporation refuses to grant extension of pipe line.**

Subdivision 1 of section 65 of the Public Service Commissions Law requires a natural gas corporation to furnish service, by extending its instrumentalities and facilities to the premises of an applicant, where it is shown that such extension and service are in all respects just and reasonable. Upon the refusal of the gas corporation to make such extension, the Commission has ample authority to make an order, pursuant to the provisions of subdivision 2 of section 66 of the Public Service Commissions Law, requiring the company to extend its main and give such service; it having been determined by the Commission that all the requirements of subdivision 1 of section 65 have been satisfied.

Accordingly *held*, that the respondent should be directed to extend its gas main and service from its existing distribution system to the premises of the complainant, it having been made to appear that the complainant is an inhabitant and taxpayer of the town of Leicester; that he would annually use about seventy-five dollars' worth of gas at the prevailing rate in said town, for domestic and other purposes; that the cost of the pipe for such extension would be from twelve to fifteen cents per foot; that the complainant is willing to pay all expenses of such extension, except cost of pipe and other materials, and bind himself to take such gas for a period of five years; that the respondent has an abundance of gas in said town, and operates two franchises therein, one in the rural part of the town and the other in the village of Moscow; the town fran-

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chise authorizes pipe and service lines to be laid in any and all of the highways, and requires the company to furnish gas to users along the highway containing its mains, and the company is now furnishing such service on one highway; the village franchise, among other things, permits the company to lay and maintain pipes and mains in the streets for transportation of natural gas, for any purposes, including the supplying the village and its inhabitants with natural gas. These facts have been established in this case, and fully justify an order for the extension from the distribution system in the village of Moscow, a distance of about 1,000 feet.

Norton, Penney, Spring & Moore, attorneys for the petitioner.

James M. E. O'Grady, attorney for the respondent.

HODSON, Commissioner.—The respondent in this case challenges the authority of the Commission to make an order requiring a gas corporation to extend its gas mains and service from its existing plant to the premises of a proposed consumer. This is not a special objection relating to the reasonableness of such proposed extension, but is general in its character, and attacks the regulative power of the Commission, which has been frequently exercised, with no thought heretofore that there was any doubt about it. The petitioner is a resident of the city of Buffalo, and owns an extensive dairy and poultry farm in the town of Leicester, Livingston county, which he operates throughout the year, and where he and his family spend the summer months.

The farm buildings are located on a highway leading into the village of Moscow, about 1,000 feet away. The dwelling house is occupied all the year 'round by relatives of the petitioner, and natural gas is required by them for both fuel and lighting purposes; while in the various buildings, devoted to the care of stock and poultry, a large quantity of gas would be used. It will not be seriously questioned but that, to satisfy all such requirements, the petitioner would be a profitable customer of a company having gas to sell, and being conveniently located for such service. The respondent also raises the question that, "under all the proof in this case, a compliance with the demand of the petitioner would not be such a reasonable improvement and extension of the works

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\* \* \* lines, \* \* \* and other reasonable devices, apparatus and property of a gas corporation as is contemplated by section 66 of the Public Service Commissions Law."

The Pavilion Natural Gas Company has been granted, and is now operating under, two franchises in the town of Leicester: one granted on the 13th day of September, 1913, by the proper authorities of the town of Leicester, and covering all the highways in the rural part of the town; and the other granted on the same day by the president and trustees of the village of Moscow, which is wholly within the limits of the town of Leicester. This latter franchise authorizes the respondent, its successors and assigns, "to enter upon and use any of the public ways and places in said village for the purpose of laying, repairing and maintaining pipes, mains, branches and conduits for the transportation of natural gas in the said village of Moscow, along all of the public streets \* \* \* and places for the purpose of laying, repairing and maintaining any necessary or proper appliances for supplying said village with natural gas for heating and illuminating purposes, and the transportation of gas from any well owned \* \* \* or operated by the Pavilion Natural Gas Company, *for any purposes, including the supplying of the village of Moscow and its inhabitants with natural gas,*" while the former franchise is a sweeping permit from the town authorities, for the gas company to lay and maintain its distribution and transmission lines in all the public places of the town, for, after reciting that the company had made application for a franchise to lay and maintain pipes within the town of Leicester, upon *any and all of the highways and bridges therein*, the resolution of the town board and town superintendent of highways then provides, that the right is granted and conveyed to the Pavilion Natural Gas Company, its successors and assigns, "to lay, construct and control pipe lines and *service lines*, for the conveying of gas *in said highways* within the town of Leicester, and over and across all streams and bridges in said town for the period of fifty years." When the town officials granted the application of this company to construct and maintain its pipe lines and service lines in any and all the highways of the town, it is plain that they intended to authorize the

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construction and operation of both transmission and distribution lines throughout the town; and if this is a fair construction to be given to the language used, then it must follow that the company has the right to use any highway for the purpose of conveying natural gas to customers within the town, and that no exception can be made of the highway leading to the premises of the petitioner. Substantially, this is the ruling made by the Commission in March, 1916, upon a preliminary objection raised by the respondent in this case. At the time this objection was first presented by counsel for the gas company, a brief was filed with the Commission, and it was therein urged that the franchise through Leicester was only for transmission of gas to the village of Moscow, and that such franchise would not have been sought for any other purpose; but the fact remains that it was sought for other purposes, and was granted by the town officers and accepted by the gas company for the distinct purpose of constructing and maintaining service lines in any and all of the highways of the town, and all this appears by the franchise itself, which is an exhibit in this case. Moreover, the respondent is now maintaining and operating a service line or distribution system in said town by furnishing gas to users along the highway containing its mains; and this leads us to the consideration of another provision of the town franchise which has been the subject of much controversy throughout the trial of this case.

By the third paragraph of the franchise the respondent "covenants and agrees to sell and furnish to all of the said inhabitants of the town of Leicester, in front of whose premises such gas mains shall be laid, such gas as said inhabitants may require for lighting, heating and manufacturing," for a stated price, and so long as the supply of gas can be obtained. This is taken by the respondent as a basis for the claim that by the inclusion of a certain class of the inhabitants who are to be favored with gas service, it is intended to exclude all others. We are not in accord with this contention. The language of the franchise does not justify any such conclusion, and the Public Service Commissions Law would not permit it. Otherwise it would be within the power of the gas company to discriminate in favor of or against



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the inhabitants of the town, contrary to the terms of the franchise and in direct violation of the agreement of the company. In other words, when the town authorities entered into this franchise-contract with the gas company, they represented all the inhabitants of the town with reference to gas service, and it cannot be that the respondent has the power to break down public regulation of this utility by merely determining that it will not operate a service line except in such highways as it may arbitrarily select, and thus deprive other localities from enjoying like privileges, who are able to show that their demands as to such service are in all respects just and reasonable.

It appears, therefore, that under the broad provisions of the franchises now possessed and operated by the respondent in the town of Leicester, any inhabitant of the town may properly ask for an extension of the gas mains and service to his premises, and it only remains for the Commission to determine the reasonableness of such extension; but in this connection we must also pass upon the further point which has been raised by the respondent, that this Commission is without jurisdiction to make an order requiring any extension of the distribution system of a gas company, because the words "mains" and "pipes" are not included in the law which authorizes the Commission "to order reasonable improvements and extensions of the works, lines, conduits, ducts and other reasonable devices, apparatus and property of gas corporations;" and the argument is made that the Legislature never intended that the mains and pipes of a gas company should be comprehended by the language used. This objection is so startling and novel that it commands our particular attention, and requires a careful examination of the law relating to the subject, to the end that a correct ruling may be made in this matter, and that it may be ascertained and definitely determined whether the established practice of this Commission, which has been followed for nearly nine years, is or is not authorized by law.

Section 62 of the Transportation Corporations Law provides that gas must be furnished and mains extended to premises within one hundred feet of an existing main. This is a specific requirement for the extension of mains and service under certain cir-

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cumstances. This statute is silent as to any such extension beyond the limits of one hundred feet; and for any such additional extension, or even the enforcement of the requirement for extending one hundred feet, authority must be found in the statute, for it will not be claimed that this Commission could make such an order unless that power has been delegated to it by the Legislature.

Turning now to subdivision 1 of section 65 of the Public Service Commissions Law, we find that it is provided that "every gas corporation \* \* \* shall furnish and provide such service, instrumentalities and facilities as shall be safe and adequate, and in all respects just and reasonable;" and under subdivision 2 of section 66 of the same law, it is clear that complete authority is vested in the Commission to carry out the provision and enforce the requirements of section 62 of the Transportation Corporations Law and subdivision 1 of section 65 of the Public Service Commissions Law; this authority is found in the provision that "the Public Service Commission has power to order reasonable improvements and extensions of the works \* \* \* lines, conduits, \* \* \* and other reasonable devices, apparatus and property of the gas corporations."

Under the provisions of the Transportation Corporations Law, the Commission is no more limited to an extension of one hundred feet, which that law requires a gas company to make, than its jurisdiction is confined to the few gas users along a single highway in which the gas company now operates its franchise in the town of Leicester.

The two situations thus presented are quite analogous. In the case of an extension required by the Transportation Corporations Law to customers living within one hundred feet of an existing main, the commission has the undoubted authority to order such extension by a gas company, where such company has failed to make the same voluntarily, and this, too, without any necessity for proof as to the reasonableness of such extension, because the law has fixed and determined the rights of the parties. Likewise the same provision of the Public Service Commissions Law delegates the power to this Commission to order *any* reasonable

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improvements and extension of the works, lines, apparatus and property of a gas corporation, and this would comprehend any locality beyond the one hundred feet limitation; but in such a case, it will be noted, the extension cannot be ordered until it is found to be reasonable. This principle has recently been declared by the Supreme Court, first department, and must be deemed the settled law of the state. *People ex rel. N. Y. & Queens Gas Co. v. McCall*, 171 App. Div. 580.

Under the terms of the Leicester franchise, the respondent is obligated to furnish gas to all applicants along a highway occupied by its mains; but suppose the company refuses to give such service, then, obviously, it becomes the duty of the Commission, if requested, to compel such service. These are services which the company is bound to give, without any further proof than that it is neglecting to comply with the plain provisions of the franchise. But in the case of another inhabitant of the town, like the petitioner, who lives on a highway not used by the gas company, the Commission is clothed with the same power to order an extension, but with this difference,— the applicant must show and the Commission must determine that the same is, in all respects, just and reasonable. And right here we are confronted with the further objection of the respondent that the petitioner has not met the requirement of the Public Service Commissions Law just referred to, that the burden is upon him to show that his request is a reasonable one.

It is true that before an order can be properly made directing an extension of gas mains and service, such as the petitioner requires in this case, certain facts must be presented to the Commission which fairly satisfy the requirement of the statute as to the reasonableness of such extension; and it may be stated that an applicant is usually expected to furnish proof of such facts. In the present case, it clearly appears from the petitioner's showing that his farm buildings are about 1,000 feet from the Moscow distribution system of the respondent, and something over a mile from the highway occupied by the transmission line of the company, along which line the respondent now serves its customers

with gas; that he is a taxpayer in said town and one of the inhabitants; that he would annually use about seventy-five dollars' worth of gas at the prevailing rate of forty-five cents per 1,000, for domestic and other purposes; that he has endeavored for two years to obtain gas service from the respondent, but without success; that it would cost between twelve and fifteen cents per foot for the pipe necessary for any such extension, and cost about five cents per foot to lay the same; that the petitioner is willing to pay for all ditching, laying, and filling, and all other necessary expenses in making the extension from the Moscow mains, except the cost of the pipe and other materials; and also offers to bind himself to take gas from the respondent as above stated for a period of five years; and that the company has an abundance of gas in said town.

Apparently the petitioner assumed the burden thus put upon him, and has willingly borne it, although it is believed that the load was not a particularly heavy one to carry; but whether heavy or light, and no matter if the petitioner stands alone in making the necessary proof, the above array of salient facts, which we hold have been sufficiently proved in this case, meet the requirement of the statute as to reasonableness of service, just as effectively as though a cloud of witnesses and a flood of testimony had been produced, for, in the last analysis, it is the quality of evidence, and not the quantity, which determines its value.

Opposition was made by the respondent to any extension leading out of the village of Moscow from the mains of the gas company in that village, and it was claimed that such extension would necessarily include a "dead end" to the main where such service terminated; this appears by the testimony of the company's manager, who also stated that in his opinion such a condition would result in condensation and other troubles which would find reflection on the Moscow service. But it must be apparent, and such witness conceded, that the same situation exists in any street of the village where an extension is made for a considerable distance with a single line of pipe. This method is employed by gas companies generally, and, indeed, is used by the respondent in this very village, but the Commission has not been informed

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that any trouble ensues from such practice; and inasmuch as this course seems to be the proper one to follow in cases like the present one, the duty would clearly devolve upon the gas company to install such appliances as would obviate any trouble.

Under all the facts and circumstances of this case the Commission finds and determines:

*First.* That under the provisions of the franchise from the town of Leicester, the petitioner is entitled to have service of natural gas by the respondent.

*Second.* That subdivision 1 of section 65 of the Public Service Commissions Law requires the respondent to furnish such service by extending its instrumentalities and facilities to the premises of the petitioner, provided it is found to be just and reasonable.

*Third.* That the request of the petitioner herein has been shown to be in all respects just and reasonable.

*Fourth.* That subdivision 2 of section 66 of the Public Service Commissions Law confers upon this Commission ample authority to make an order requiring the respondent to extend its main and give such service to the petitioner.

*Fifth.* That the respondent should be directed to extend its gas main and service from its system in the village of Moscow, along the public highway to the lands and premises of the petitioner in the town of Leicester, a distance of about 1,000 feet; such extension to be commenced on or before July 15, 1916, and to be completed on or before July 29, 1916, — on condition, however, that the petitioner file in the office of the respondent in LeRoy, N. Y., on or before July 10, 1916, a written statement or agreement whereby the petitioner shall obligate himself, his successors and assigns, to take the service of natural gas from the said extended main of the respondent for a period of at least five years, and pay therefore the prevailing rate or price in the town of Leicester, and will do or cause to be done all work necessary for such extension, or reimburse the respondent for all expenditures therefor, except the cost of pipe and other materials; and an order will be entered accordingly.

All concur, except Commissioner Carr not present.

IN the Matter of the UNITED TRACTION COMPANY'S PROPOSED  
NEW PASSENGER FARES AND CHARGES, and Regulations and  
Practices Affecting Such Fares and Charges

Case No. 5363

(Public Service Commission, Second District, June 26, 1916)

Proposed increases of fare between adjacent cities on certain interurban lines operated by the same company must be shown to be justified.

Unjust discrimination cannot be made between classes of patrons.

The corporation proposing increased rates should affirmatively prove justification.

The United Traction Company, operating electric street railways in and between Albany, Troy, and neighboring communities, filed a tariff increasing the fare between Albany and Troy from ten to fifteen cents, and increasing fares between Albany, Troy, and certain intervening points from five to ten cents. A suspension and investigation order was entered in accordance with chapter 240 of the Laws of 1914. The respondent defended the proposed increase on the ground that its revenues on its entire system were insufficient to enable it to earn a fair return, and that the selection of this particular route for an increase was a matter within the managerial discretion of the company.

*Held*, 1. That the respondent failed to show that the particular line concerned was unprofitable taken by itself or by comparison with other lines.

2. The evidence disclosing that the proposed increases would so operate as to impose upon passengers on this line from two to three times as high a fare as is imposed upon passengers upon other lines of the company for as great or greater distances, a discrimination was established which was unlawful unless justified by the respondent.

3. That the respondent failed to justify such discrimination.

4. It seems that section 181 of the Railroad Law, restricting street railways from charging passengers more than five cents for a continuous ride from point to point within the limits of an incorporated city, is no longer operative where the street railroad company can show that at the statutory rate it is unable to earn a fair return.

5. One class of patrons may not be subjected to a rate in itself unreasonably high in order to recoup losses sustained in serving other classes at unprofitable rates even if the unprofitable rates are imposed by law.

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Public Service Commission, Second District

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H. T. Newcomb and Townsend K. Wellington, for United Traction Company.

William E. Woollard, Edwin T. Coffin and Julius Ilch, for Albany Chamber of Commerce.

Albert J. Danaher, Corporation Counsel, for City of Watervliet.

Joseph J. Wallace, for James C. Fitzgerald.

John P. Judge, for City of Troy.

Edward A. Mealy, for City of Cohoes.

C. T. Dolson, for Schuyler Park Improvement Association.

H. J. Goldman, Dr. W. G. Ryon, P. L. Ball, William J. Thomson and Floyd A. Lane, for Menands Improvement Association.

Harry C. Wardell and Walter M. Bates, for Rensselaer Board of Trade.

Clark A. Waterbury, President Rensselaer Board of Trade.

Prentiss Carnell, for Albany Business College.

William C. Gloeckner, for residents of Cemetery avenue.

John P. Dormer, for National League of Government Employees.

John H. Reinech, for Watervliet Arsenal employees.

L. D. C. Woodward, for Watervliet Chamber of Commerce.

Edward L. Kellogg, John D. Johnson, J. D. Fitzgerald, Gertrude H. Wilsey, Mrs. William E. Bigg, Mrs. J. N. Van Dycke and Miss Weare Coffin Little, in person.

P. C. Dandurand, for Cohoes Business Men's Association and Board of Trade.

IRVINE, Commissioner.— The United Traction Company, operating electric street railways in the cities of Albany, Rensselaer, Troy, Watervliet, and Cohoes, the villages of Waterford and Green Island, and in intervening territory, filed, to become effective January 1, 1916, a tariff (P. S. C., 2 N. Y., No. 9) changing and for the most part increasing its rates between Albany and Troy and intermediate points. A number of complaints having been filed with the Commission an order was made December 30, 1915, suspending the operation of the proposed tariff and for an investigation of the reasonableness thereof.

There are two main divisions of the United Traction Company system: one embraces the cities of Albany and Rensselaer; and the other the city of Troy and adjacent territory, including the cities of Watervliet and Cohoes, and the villages of Waterford and Green Island. There is also a line of track west of the Hudson river from Albany through Watervliet to Troy, and it is to this line that the proposed tariff applies. Cars are operated from the Plaza at the foot of State street in Albany northerly to the city limits, thence to Watervliet, and by means of a loop to and through a portion of the city of Troy, the southern part of the loop crossing the Hudson river at Congress street in Troy, and the northern at Green Island. Cars are also operated from Albany to Cohoes. A rate of five cents prevails throughout the city of Albany, and passengers are carried beyond the city limits to a point known as Schuyler bridge at this rate. Schuyler bridge is at or near the southern boundary of Watervliet. A five-cent fare also prevails throughout the Troy division, and passengers are carried at that rate on the line in controversy south to a point known as Garbrance lane, not far from the north city line of Albany. A rate of ten cents prevails between points north of Schuyler bridge and south of Garbrance lane. Transfers are given to passengers boarding cars south of Schuyler bridge to any other line in the city of Albany, and so in the reverse direction from any line in the city of Albany to Schuyler bridge. Transfers are given from any line in the Troy division which will carry a passenger to Garbrance lane, or from Garbrance lane over any line in the Troy district. A passenger going in either direction



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may avail himself of the initial transfer privilege and by payment of ten cents additional complete his journey and obtain a transfer privilege on the other division.

The proposed tariff abolishes the overlapping area between Garbrance lane and Schuyler bridge and creates three so-called zones: one comprising the city of Albany, the city of Rensselaer, and a short distance from the north limits of Albany to Garbrance lane; another the cities of Troy, Watervliet, and Cohoes, and the villages of Waterford and Green Island, and adjacent territory; a third the stretch between Schuyler bridge and Garbrance lane. In each of these zones it is proposed to charge a fare of five cents with transfers in both the Albany zone and the Troy zone. The effect is to make the tariff between Albany and Troy fifteen cents with transfer privileges at both ends as against ten cents with the present one end transfer privilege, and to make the fare between the intervening zone either to Albany or to Troy and adjacent communities ten cents. Disregarding the transfer privileges, this is an increase of 50 per cent on the Troy-Cohoes-Albany road, and 100 per cent between either Troy or Albany and the intervening territory. The distance from the Plaza loop to Franklin square, Troy, which may be taken as the limit of the Albany-Troy line, is seven and thirty-three on-hundredths miles. The distance between Garbrance lane and Schuyler bridge is two and four-tenths miles. The distance from the Plaza in Albany to Garbrance lane is about three miles, and it is something over two miles from Schuyler bridge to Troy. From Garbrance lane is about three miles, and it is something over two miles from Schuyler bridge to Troy. From Garbrance lane north the line is through the city of Watervliet to the city of Troy. From Garbrance lane south it is largely through a thickly built part of the city of Albany. Between Schuyler bridge and Garbrance lane is a thickly peopled district but the conditions are hardly urban. The general conditions of operation on the Albany and Troy line are interurban rather than urban.

This proceeding is governed by section 29 of the Public Service Commissions Law as amended by chapter 240 of the Laws of 1914, and the burden of proof is upon the carrier to show that the pro-

posed increase in rates is just and reasonable. The company to sustain this burden offered voluminous testimony tending to show that, taking its system as an entirety, its revenues have for several years been decreasing while its operating expenses has been rapidly increasing; that in 1915, while it had an operating income of \$215,532.59, there was, after paying interest, rents, charges for track and terminal privileges, and hire of equipment, a deficit of \$219,929.39. Deducting from such deficit the income received from the Hudson Valley Railway Company, owned by the respondent, left a total net deficit of \$71,596.06. From these and other figures presented it is contended that increased revenue is essential to the prosperity of the company, and it is for that reason, and that reason alone, that it is proposed to increase the Albany-Troy line rates. It is estimated that the proposed increase will yield from \$100,000 to \$104,000 per year.

We quote from the brief of the company all that relates to the selection of this particular schedule as a means of increasing the company's revenue:

"It is submitted that the reasonableness of the company's effort to obtain additional revenue has been fully sustained. This being the case and no attempt having been made to show that the particular changes suggested by the suspended schedule would produce unjust discrimination, no suggestion that such discrimination would result having been entered, it follows that the particular adjustment sought is within the reasonable managerial discretion. The particular changes proposed were determined upon from practical considerations. [Hewitt, 97.] Counsel for protestants admits the 'necessity' of looking to this interurban travel for the needed additional revenue. [Record, 233.]"

We can not find that counsel made such an admission, but that is immaterial. This is an investigation by the Commission and the Commission is not bound by admissions made by counsel voluntarily assisting.

Following is the testimony of Mr. Hewitt referred to: "Q. Now, Mr. Hewitt, the proposed increase on the Troy-Albany line, is this attempt to increase the rates the result of any scientific study you have given the subject? A. Yes, sir. Not myself

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alone, but others with me. I won't say scientific study. It was a practical study. Q. A practical study? A. Nothing scientific involved in it at all."

This is as far as we can recall or ascertain from the record the only direct testimony on the subject. There is no evidence as to the value of the property employed in the Albany-Troy service or indeed as to the value of the property employed in the entire service rendered by the company. There is no specific evidence as to the cost of operation of the Albany-Troy line. The auditor of the company testified that the gross earnings are possibly greater than the gross earnings on other lines. The accompanying table prepared from the reports of the company filed with the Commission presents more definite evidence upon the relative earnings of the Albany-Troy line and the other lines of the company.

From this table it appears that the revenue per car-mile on the Troy-Albany lines was greater from 1910 to 1914 than the revenue per car-mile either on the Albany division or the Troy division. In 1914 and 1915 the revenue per car-mile was slightly less on the Albany-Troy line than on the Albany division but much greater than the revenue on the Troy division. An inspection of the table shows conclusively that the losses, if any, are not because of the Albany-Troy operation.

As to the cost of operation, the company keeps no accounts distributing such costs among its different lines and there is therefore no specific proof. Cars run at higher speed on a large part of the Albany-Troy line than on other lines. It may be assumed that this has a tendency to increase some operating costs: as for power, maintenance of way and equipment. On the other hand, a large part of the line is constructed with T rails, the first cost of which is less than that of groove rails used in the cities. On a large part of the line there is no pavement and no probability of paving in the near future. The higher speed effects a considerable reduction in platform expense so that, on the whole, it seems more than probable that the operating expense per car-mile is less than on the urban lines. The inevitable conclusion is that this

route was not selected for an increase of fare because it was unprofitable at present fares or less profitable than other lines.

It is said that as no suggestion has been made that unjust discrimination would result from the proposed tariff its establishment is within the managerial discretion of the company. In order to establish discrimination it is not necessary that any witness should use the word. While the character of the travel is interurban there are large numbers of people living in the Troy district whose business is in Albany. There are those in the Albany district whose business is in the Troy district. In the intervening zone between Garbrance lane and Schuyler bridge practically the entire population has occasion to go to Albany or to Troy in the same manner and for the same purposes that others go from one part of Albany to another part of Albany or from one part of Troy to another part of Troy. The evidence as to the increased expense shows that they are very largely due to heavy expense for paving and re-paving and for re-laying tracks in Troy and to a greater extent in Albany. In Albany or in Troy, one, on a five-cent fare, may ride seven miles without a transfer and nine and twenty-four one hundredths miles in the same general direction with a transfer. By a circuitous route it is possible to ride ten and sixty-three one hundredths miles. In view of what has been shown as to revenues and probable expenses, how can it possibly be contended that there is no discrimination in charging three times as much for a distance of seven and three-tenths miles as is charged for seven miles or nine miles or ten miles, and twice as much between the Schuyler bridge and Garbrance lane district and Albany or Troy, a maximum of about five miles, as is charged for those other distances in the Albany district or the Troy district? These are certainly discriminations, and if they are not unjust discriminations the duty devolved upon the company of presenting evidences to justify them. The record is absolutely barren of such evidence. Possibly underlying the reason for selecting this particular route for an increase of fares is the statute (Railroad Law, § 181) which on its face restricts street railroads from charging any passenger more than five cents for a continuous ride "from any point on its road

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\* \* \* to any other point thereof \* \* \* within the limits of any incorporated city or village." This statute by its terms does not apply to passengers between different communities in the Troy district or to passengers between Albany and Rensselaer. Moreover, in view of the recent decision in *People ex rel. U. & D. R. R. Co. v. Pub. Serv. Comm.*, 171 App. Div. 607, affd. on the opinion of Cochrane, J., below, 218 N. Y. 29, it seems that the restriction is no longer operative in any case where a company can show that at the statutory rate it is unable to earn a fair return. In the view we take of the case we need not determine whether the company has shown such fact. We have no evidence as to the value of its property, and an inquiry into its proper operating expenses and interest charges would be a long and, in this case, an unnecessary task. Contestants present an elaborate argument attacking the company's calculations in many respects.

Finally, even if the statutory restriction applies and the company is not earning a fair return, it does not follow that this increase should be permitted. One class of patrons may not be subjected to a rate in itself unreasonably high in order to recoup losses sustained in serving other classes at unprofitable rates. It can make no difference in this respect that the unprofitable rate is imposed by law. The company rather than its patrons must bear the burden thereof. Comparisons are not of great value in such matters, but it may be remarked that two situations in the State most nearly analogous to the Albany-Troy service are the service given by the New York State Railways between Rochester and Charlotte, and between Utica and Whitesboro. Passengers on the Rochester-Charlotte line may ride ten and thirty-five one hundredths miles for ten cents. Passengers on the Utica-Whitesboro line may ride ten and thirty-nine one hundredths miles for five cents. On the Warren and Jamestown railroad, passengers are carried between Frewsburg and Jamestown, a distance of about six miles, for ten cents. Frewsburg is a small village and a large part of the intervening territory is practically unpeopled. If a fifteen-cent charge between Troy and Albany would not be unreasonably high, a ten-cent charge is certainly not unusually low.

All concur.

CARR, Commissioner (concurring).— I believe that the entire city of Albany should be considered as one zone in which a five-cent fare should apply. The limit of this zone should be the northerly boundary of the city of Albany. There should be an intermediate or so called interurban zone which should extend from the northerly boundary line of the city of Albany to the southerly boundary line of the city of Watervliet, in which a five-cent fare should apply. There should be another zone comprising the present territory operated by the Troy division, namely Troy, Watervliet, Green Island, and Waterford, in which a five-cent fare should apply. A passenger should be entitled to ride for ten cents on a through car going from the loop or terminal in the city of Albany to any point in Troy reached by this direct line. If a passenger desires to ride from any point on the Troy division and transfer to the direct line and ride to the point of destination of the direct line in the city of Albany, he should pay five cents on the Troy city line and ten cents on the interurban, and *vice versa* with respect to passengers going from some point on the Albany division and transferring to the interurban line for Troy. A passenger from the intermediate or interurban zone so called should be entitled to ride for five cents from any point in that zone to any point in the city of Albany or in the city of Troy reached by the direct line, but should not be entitled to a free transfer for this five-cent fare which would take him to other points in the city of Albany or to points on the Troy division. I believe that this is a fair arrangement of these rates and that it would not work any hardship upon the public in any respect. I also believe that it would give the Traction company a reasonable return for the service which it performs.

Another thing which should be borne in mind in connection with this case is that in the city of Albany particularly, the Traction company is as a whole giving more service than its earnings justify. Whether this is due to the fact that it runs cars on a close headway during the non-rush hours as well as during the rush hours, I can not state. It may be that the people in the city of Albany could get better service in the city of Albany than they get now with a considerable less number of car-miles per mile of road. The figures

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show that the car-miles per mile of road in the city of Albany are considerably more than 60 per cent higher than any other road in the State of New York outside of the metropolitan district. If a thorough rearrangement of service could be made in the city of Albany, it is possible that much better accommodations could be given to the public at a lower cost to the traction company.

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In the Matter of the Joint Petition of THE LEHIGH VALLEY RAILWAY COMPANY, Lessor, and Lehigh Valley Railroad Company, Lessee, Under Section 55 of the Public Service Commissions Law, for Authority to the Railway Company to issue \$1,100,000 in Fifty-Year 5 Per Cent Debenture Gold Bonds

Case No. 5697

(Public Service Commission, Second District, June 26, 1916)

Reimbursement of the treasury of one corporation for advances made by it to another corporation.

The Lehigh Valley Railroad Company made certain advances and is to make further advances under an agreement with the Lehigh Valley Railway Company for the purpose of making additions and betterments to the road and equipment of the latter company. The order herein was made upon joint petition. Permission granted with the usual restrictions.

By THE COMMISSION.—Now, therefore, upon the foregoing record, ordered as follows:

1. That the Lehigh Valley Railway Company is hereby authorized to issue \$1,100,000 face value of its 5 per cent fifty-year debenture gold bonds, which shall be sold at a price not less than the face value thereof to give net proceeds of at least \$1,100,000.

2. That said bonds of the face value of \$1,100,000 so authorized or the proceeds thereof to the amount of \$1,100,000 shall be used solely and exclusively for the reimbursement of the treasury of the Lehigh Valley Railroad Company for advances made and to be made by it to the Lehigh Valley Railway Company, for

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additions and betterments to the road and equipment of the latter company, as follows:

Advances to March 31, 1916.....	\$805,208 75
Estimated advances made and to be made to June 30, 1916.....	298,510 51
	<hr/>
	\$1,103,719 26
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Amount unprovided for .....	\$3,719 26
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3. That if said bonds of a total face value of \$1,100,000 herein authorized shall be sold at such prices as will enable the company to realize net proceeds of more than \$1,103,719.26, no portion of the proceeds of such sale in excess of the last aforesaid sum shall be used for any purpose without the further order of this Commission.

4. That none of the said bonds herein authorized shall be hypothecated or pledged as collateral by the Lehigh Valley Railway Company unless any such pledge or hypothecation shall have been expressly approved and authorized by this commission.

5. That the Lehigh Valley Railway Company shall, for each six months period ending December thirty-first and June thirtieth, file, not more than thirty days from the end of such period, a verified report showing:

(a) What bonds have been sold or otherwise disposed of during such period in accordance with the authority contained herein and the date of such sale or disposition.

(b) To whom such bonds were sold.

(c) What proceeds were realized from such sale.

(d) Any other terms and conditions of such sale.

(e) The amount expended of the proceeds for the purpose specified herein during such period, and stating to what account or accounts such expenditures have been charged.

Such reports shall continue to be filed until all of said bonds shall have been sold or disposed of and the proceeds used in accordance with the authority contained herein, and if during any period



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no bonds were sold or disposed of or proceeds used, the report shall set forth such fact.

6. That the company shall, within thirty days of the service of this order, advise this Commission whether or not it accepts the same with all its terms and conditions.

Finally, it is determined and stated, that in the opinion of this Commission the money to be procured by the issue of said bonds herein authorized is reasonably required for the purpose specified in this order, and that such purpose is not in whole or in part reasonably chargeable to operating expenses or to income.

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In the Matter of the Complaint of RESIDENTS OF THE CITY OF CORNING, the Town of Corning and the Incorporated Village of Painted Post against CORNING AND PAINTED POST STREET RAILWAY, as to Service Rendered the Public; and as to Transfers

Case No. 5181

(Public Service Commission, Second District, June 26, 1916)

Consideration of complaints of residents along the line of an interurban electric railroad as to improper and insufficient cars and also as to transfers.

The complainants alleged that the company operated only old, dilapidated and leaky cars, and an insufficient number of cars and that it refused transfers between the main line and the Bridge street line in the city of Corning except at a certain point which is the connecting point or terminal between the routes of the cars running through the city of Corning. The corporation denied these allegations. On the report of the Commission's inspector that to his knowledge the company is doing everything possible to secure new cars and the question of transfers having been eliminated by consent, the case was closed on the record with the provision that it could be re-opened at any time unless the railroad company acted in good faith in securing new cars.

BY THE COMMISSION.— This case comes to the Commission on the complaint of many residents of Corning and Painted Post, which municipalities are served by the respondent; the complaint alleges that the company operates only old, dilapidated and leaky cars, and not a sufficient number of cars to take care of the pas-

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Public Service Commission, Second District

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senger traffic; complaint is also made that the respondent refuses transfers between the main line and the Bridge street line, so-called, except at a certain corner in the city of Corning, which is known as the connecting point or terminal between the routes of the cars running through the city of Corning; the respondent filed its answer on the 4th day of October, 1915, denying the allegations of said complaint, and on the fourth and twenty-second days of November, this case was heard by the Commission in the city of Corning, at which hearings Mr. Guy W. Cheney, of Corning, appeared as the attorney for the complainants herein, and Mr. Ross N. Lovell of the firm of Stanchfield, Lovell, Falck & Sayles, of Elmira, appeared as the attorney for the respondent; certain proofs and proceedings were taken and had at said hearing, whereby it satisfactorily appears that the respondent operates a street surface railroad for about a mile and a half through all of the important business streets of the city of Corning, one line running from the center of the city, mentioned above as the terminal of the routes, to the Delaware, Lackawanna and Western Railroad station, which is located on the northerly limits of the city, and the other branches off and runs to the westerly limits of the city, from which point it continues for about a mile and a half to the village of Painted Post; most of the city tracks of the railroad company have recently been relaid, and the same are in fairly good condition; the cars operated by the respondent, except in the summer time, are mostly old and out of repair, but at said hearings, the representatives of the company stated that they intended to improve such rolling stock and purchase some new cars; and there has been considerable correspondence between the Commission and the company concerning such new cars, and the Commission has been informed that four new cars have been purchased and the use of some others has been rented from the Elmira Water, Light and Railroad Company, in order to meet the demands of increased travel on said railroad until new cars could be obtained; considerable difficulty has been experienced by the company in assembling the various parts of such new equipment, which have been purchased from different companies; and must be assembled before delivery to the respondent; it appears by the

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communications of the respondent to the Commission that the trucks for the four new cars were built in Philadelphia, and the wheels and axles are ready, in Sayre, Penn., for the gears, which are made by the General Electric Company at Schenectady; and that when the gears are mounted on the axles they must be shipped to Philadelphia, there to be placed on the trucks; after the trucks are thus completed they will have to be shipped to the car builders and by them placed under the car bodies; such car bodies are to be equipped with electrical apparatus, which has been shipped direct to the car builders; and after all this assembling, and the cars are completed, the same will be shipped to Corning for use by the respondent; a communication from the Electric Railroad Inspector, dated June 7, 1916, was transmitted to the company by the Commission and the same embodies a recommendation that the respondent be required to add to its equipment and put in operation four new closed cars on or before the first day of September, 1916, and that the company notify this Commission on or before July 1, 1916, whether it will comply with such requirement; on the 12th day of June, 1916, a communication was received from the general manager of the respondent, announcing that the company will comply with such recommendation if it is physically possible to do so; and said inspector has reported to the Commission that, from his personal knowledge of the situation, the company is doing everything possible towards obtaining an early shipment of these cars; and that, judging from the progress already made, these four cars will be in operation by September 1, 1916.

On the question of transfers, it clearly appears that the rules and regulations of the respondent concerning the same are just and reasonable, and the attorney for the complainants at said hearings announced that he would not press that part of the complaint.

It is therefore ordered, That this case be and the same hereby is closed upon the records of the Commission, on condition, however, that the same may be re-opened at any time it shall be made to appear that the respondent is not acting in good faith as to the delivery and operation of said new cars.

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Public Service Commission, Second District

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In the Matter of PROPOSED NEW PASSENGER FARES by Various  
Common Carriers Subject to the Jurisdiction of this Com-  
mission

Case No. 5345

(Public Service Commission, Second District, June 26, 1916)

Further suspension of proposed increase of tariffs in this proceeding.

Certain increases within this jurisdiction having been heretofore ordered suspended until the first day of July, 1916, and it now appearing that a sufficient hearing cannot be concluded within that period, the operations of such tariffs is ordered suspended until September 30, 1916.

By THE COMMISSION.—It appearing, that by order dated the 22d day of December, 1915, this Commission entered upon a hearing concerning the propriety of the increases in certain new individual and joint fares and charges applying to the transportation of passengers between points within and subject to its jurisdiction contained in tariffs, described in said order, of carriers or their duly authorized agents specifically named therein and which had been filed with this Commission to become effective January 1, 7 and 10, 1916.

It further appearing, That pending such hearing and decision the Commission ordered that the operation of said tariffs be suspended, and that the use of said fares and charges be deferred upon traffic subject to the jurisdiction of this Commission until the 29th day of April, 1916, unless otherwise ordered by the Commission; and thereafter it having appeared that such hearing could not be concluded within the period of suspension last stated, this Commission by its order of April twenty-fifth last further suspended the operation of said tariffs and directed that the use of said fares and charges should be further deferred until the 1st day of June, 1916, and by order dated May 25, 1916, the Commission further suspended the operation of said tariffs and directed that the use of said fares and charges should be further deferred until the 1st day of July, 1916, unless otherwise ordered by the Commission;

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and it now appearing that the aforesaid hearing cannot be concluded within the period of suspension last above stated;

It is ordered, That the operation of said tariffs be and hereby is further suspended and the use of said fares and charges be and is further deferred upon traffic subject to the jurisdiction of the Public Service Commission, Second District, until the 30th day of September, 1916, unless otherwise ordered by the Commission; this order, however, does not concern certain tariffs of the New York Central Railroad Company, the New York Central Railroad Company as lessee, etc., of the West Shore Railroad, the New York Central Railroad Company as lessee, etc., of the Boston and Albany Railroad, and C. L. Hunter, to the extent that he represents as agent said New York Central Railroad Company and said West Shore Railroad Company, because by order of this Commission dated June 8, 1916, all of said last specifically mentioned tariffs have been directed to be cancelled on or before July 1, 1916.

It is further ordered, That a copy of this order shall be filed with each of said tariffs in the office of this Commission, and that copies hereof be forthwith served upon the respondents to this proceeding.

It is further ordered, That upon receipt of this order by said carriers, respondents to this proceeding, such carriers or their duly authorized agents shall publish and file with the Commission proper tariff amendment containing notice of this order of suspension and stating that said tariff or tariffs are under suspension as to the New York State traffic which is subject to the jurisdiction of the Public Service Commission, Second District, and may not be applied or charged until further notice, or until September 30, 1916, such tariff amendments to also refer by P. S. C.—2 N. Y.—number or numbers to the tariff or tariffs in which fares or charges effective during the period of further suspension may be found. The title page of every such tariff amendment shall show issued date July 1, 1916, and bear notation "Issued to the public and the Commission under order of the Public Service Commission, Second District, State of New York, of date June 26th, 1916, in Case No. 5345."

In the Matter of the Application of the MAYOR AND COMMON COUNCIL OF THE CITY OF JAMESTOWN for the Elimination of Certain Grade Crossings of Highways over the Tracks of the Erie Railroad Company in said City

Case No. 1519

(Public Service Commission, Second District, July 10, 1916)

**Modification of a former order for the extension of a street in the city of Jamestown in such manner as to provide for railroad crossing.**

The city of Jamestown on February 28, 1916, submitted its petition of the Commission to approve a modification of the plan of laying out the highway traffic, routes and approaches to the new station in that city so as to eliminate grade crossings at Institute street, Main street and West Second street, which street approaches the Erie Railroad Company proposes to build at Jamestown. Petition granted with the usual restrictions.

**BY THE COMMISSION.**— The city of Jamestown, by petition dated February 28, 1916, has asked this Commission to approve a modification of the plan heretofore approved in so far as it relates to the layout of highway traffic facilities and approaches to the new station, which, as necessarily incident to the elimination of its grade crossings at Institute street, Main street and West Second street, the Erie Railroad Company proposes to build at Jamestown.

From testimony taken at a hearing in the matter at Jamestown on June twenty-ninth last, it appears that the plans for the new station as originally prepared by the railroad were not satisfactory to the city, because under said plans the approach from Main street, which is now used by a large number of pedestrians as a convenient way of access to the station, would be destroyed; besides which the driveway immediately to the rear of the present station and now used by the public mainly for express and baggage delivery would be measurably curtailed. It further appears that for the loss and curtailment in access and highway area last mentioned the plans heretofore approved provide no complete compen-

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sating advantages, either in means of access to the station or in the method of handling the station business.

According to a plan upon which the changes desired by the petitioners are shown, said plan being attached to the petition, the main building of the new station is to extend to the curb line of West First street (the street parallel to the railroad and passing in front of the existing station) and this street, which now ends at the station, is to be extended westerly a distance of about 290 feet to a junction with Washington street (an existing north and south street).

The plan further provides for a pedestrian subway under two tracks leading from the proposed new station building to an island platform about 600 feet long to be located between the second and third tracks, a waiting shed, canopy, and stairways leading to the subway being included. The cost of this subway, island platform, stairway, canopy, etc., and any and all expenses connected with the constitution thereof, the railroad company offers to bear, no part of such cost to be charged against the elimination account.

To accomplish this project it will be necessary to acquire land for the extension of West First street, estimated, inclusive of any consequential damages, to cost about \$16,000, and to grade and improve said extension and a portion of Washington street at an estimated cost of \$18,775, less a credit of \$9,775, the estimated cost of certain work covered by the existing plans, which work will not be required if the proposed modification shall be approved — resulting in a net cost of \$9,000 for such grading and improvement, making an estimated total cost of such street extension of \$25,000.

At the hearing on June twenty-ninth Samuel A. Carlson, mayor, and Cheston A. Price, corporation counsel, appeared for the city of Jamestown; Cyrus E. Jones for the Furniture Manufacturers' Building, Inc., Fred C. Butler for the Jamestown Board of Commerce; F. O. Anderson for the Empire Case Company; A. C. Greenlund for the Jamestown Launch Company, and Messrs. Jerome B. Fisher, T. H. Burgess and Marion H. Fisher, attorneys, and R. S. Parsons and W. H. Brameld, respectively, chief engineer and assistant engineer, for the Erie Railroad Company.

There was no opposition to the changes in plan (with the additional expense involved which would result from such change) on the part of the railroad company, the city of Jamestown, or any of the other interested parties who appeared; and the Commission on July tenth, after due consideration, has accordingly determined that the extensions of West First street and the improvement of said extension and a portion of Washington street as proposed would be of great advantage to the municipality and compensate the railroad company for the loss of facilities which it would suffer if the present plans should be carried out; and that the increased expense, estimated at \$25,000, properly should be charged against the elimination project under certain conditions hereinafter stated. Therefore, it is ordered,

*First.* That the order herein of July 30, 1912, be and it is hereby modified to provide for the extension of West First street in the city of Jamestown from its present terminus at the westerly line of Cherry street to a junction with Washington street upon an alignment as shown upon a plan presented at the hearing on June 29th, said plan, on file with the Commission, being entitled: "Erie Railroad Co. Proposed Improvements at Jamestown, N. Y. Office of Engineer of B. & B., Scheme P. 2, January, 1916, I. C. E. Scale 20 feet, 1 inch. Revised June 28, 1916."

Beginning at the westerly curb line of Cherry street, West First street extension, shall be built on the following grades: ascending 3 per cent for a distance of about ninety feet; thence level a distance of about fifty feet; thence ascending 4 per cent for a distance of about fifty feet; thence ascending nine per cent for a distance of about one hundred feet to a point opposite the easterly curb line of Washington street; thence level around the turn into Washington street. The grade of Washington street unless already so constructed shall descend to West Second street at the rate of about 9 per cent.

On account of the projected northerly street line and the varying width of the proposed new station structure, the extension of West First street herein provided for will not be of uniform width, A concrete sidewalk of at least ten feet wide on its northerly side and a sidewalk of similar width on the east side of Washington



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street shall be provided, together with retaining walls, railings, etc., as found to be necessary. The entire roadway on West First street and on Washington street, to West Second street shall be paved with brick and inlets, catchbasins, manholes, and other structures shall be built if found to be necessary in order to secure complete and rapid disposition of surface waters.

*Second.* This order is made upon the express understanding that the total charge which shall be made against the elimination project herein for account of the improvement provided for in this amendatory order shall not exceed the sum of \$25,000 and that no financial liability or obligation on account of the extension of West First street herein provided for, including cost of land, consequential damages, grading and improvement of said extension and of that part of Washington street involved, and including all other expenses, cost and charges whatsoever, in excess of \$6,250, being its statutory share (one-quarter) of the herein determined and agreed upon cost of this particular item of the elimination project, shall attach to or fall upon the State of New York, or shall be a charge upon or be payable out of any moneys which may have been or may be appropriated by the legislature of the State for the purpose either of elimination of grade crossings or of the reconstruction of work at crossings either at grade or otherwise. If the cost of such extension of West First street, etc., shall exceed the sum of \$25,000, all of such excess cost shall be assumed and paid for by the city of Jamestown, acceptance of this order by the city to be deemed its assumption of any such excess cost.

*Third.* This order is furthermore expressly conditioned upon the construction by the Erie Railroad Company, at its own proper cost and charge, of a subway from its proposed new station building to a new island platform about 600 feet long, together with two stairways leading from said platform to said subway and including the erection of canopies and a waiting shed, all as more particularly shown and designated upon the plan hereinbefore referred to, as such plan may be modified before its final approval by this Commission.

*Fourth.* It is further expressly provided and this order is made upon the condition, assented to by the Erie Railroad Company, that

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said railroad company makes and will make no claim against the State of New York and no charge against this elimination project for damages to its existing station building or station property in Jamestown due to the elimination of the grade crossings involved herein, or for the cost of the new station building which it proposes to erect in connection with this improvement, which new station and any additional station facilities not covered by this order or any order previously entered herein which facilities the railroad corporation may hereafter determine to provide, in elaboration of its plans for such new station, are to be made and provided at the expense of said corporation.

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In the Matter of the Joint Petition of the TOWN BOARD OF THE TOWN OF YORK, LIVINGSTON COUNTY, and the DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, under Section 91 of the Railroad Law, as to the Closing and Discontinuance of the LeRoy-Alexander Highway Grade Crossing of the New York, Lackawanna and Western Railroad, the Construction of a New Piece of Highway and the Diversion of Travel from Said Grade to the Grade Crossing of the Fowlerville-Pavilion Center Road

Case No. 5564

(Public Service Commission, Second District, July 10, 1916)

**Consent given for the closing and discontinuance of a highway grade crossing in the town of York, Livingston county.**

At the Linwood station in the town of York and county of Livingston, two highways are crossed by the New York, Lackawanna and Western railroad at grade. One of these highways crosses at a very sharp angle and is extremely dangerous. It is proposed to close this crossing and to divert the existing travel thereon to another highway known as the Fowlerville-Pavilion Center road, by constructing a new piece of highway; both highways to be re-graded. Permission granted upon condition that the railroad company pay the entire cost of construction and of securing any additional land necessary.

BY THE COMMISSION.— In the town of York, at the Linwood station, the New York, Lackawanna and Western railroad is crossed at grade by two highways: one of them, a north and south

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highway known as the Fowlerville-Pavilion Center road, crosses immediately south of the station; the other, known as the LeRoy-Alexander road, crosses immediately north of the station.

The LeRoy-Alexander road crosses the railroad on a very sharp skew, and on account of the obstruction to the view this crossing, particularly when approaching from the north, is dangerous. It is proposed to close this crossing and divert traffic therefrom to the Fowlerville-Pavilion Center road by means of the construction of a new piece of highway east of and immediately adjacent to the railroad company's right of way line.

It is further proposed to enlarge the traveled portion of the Fowlerville-Pavilion Center road crossing of the tracks by making the planking over the two main tracks of the railroad not less than twenty-four feet in width, and over the switch track located easterly of the main tracks not less than thirty-four feet in width, and to reduce the grade of the highway on the westerly side of the crossing and to cause gates to be erected on each side thereof, the same to be operated continuously.

A hearing on this application was held by the Commission at Buffalo on June 16, 1916, at which Charles B. Sears and LeRoy Kenefick appeared for both of the petitioners herein; and Mrs. Elizabeth Chase, an interested property owner, in person; at which time due proof of publication of notice of this hearing and of personal service of such notice on all interested parties as prescribed by statute was made. There was no serious opposition to the granting of the application, and the Commission has accordingly determined that public safety requires that the petition be granted. Therefore

Ordered, That the LeRoy-Alexander road grade crossing of the New York, Lackawanna and Western railroad in the town of York, Livingston county, located immediately to the north of the Linwood station, be closed and discontinued, and that the travel be diverted therefrom to the Fowlerville-Pavilion Center road by means of a new highway to be constructed east of, parallel to, and immediately adjacent to the railroad company's right of way line: said highway to be forty-nine and one-half feet wide, paved with gravel or macadam to a width of not less than sixteen feet.

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The Fowlerville-Pavilion Center road and the LeRoy-Alexander road at their intersection are to be re-graded and the grades at said intersection reduced, the work to be performed in such manner as to provide wide and easy turns, substantially as shown on a map hereinafter referred to.

The planking across the sidetrack is to be constructed to a width of not less than thirty-four feet. The planking across the two main line tracks is to be made of a width of not less than twenty-four feet, and gates shall be erected on each side of the crossing, the same to be operated continuously.

That part of the LeRoy-Alexander road embraced between the right of way lines of the railroad is to be closed and discontinued by the erection of fences or other barriers along said right of way lines. The location of the new highway and the portions of the existing highways to be re-graded as herein provided are shown upon a plan on file with this Commission introduced in the evidence as "Applicants Ex. No. 3," the map bearing the following title:

"D. L. & W. R. R., Buffalo Division. Map Showing Land to be Acquired for Proposed Change of Highway at Linwood Station. Office of Division Engineer, March 8, 1916, Buffalo, N. Y. Scale 1"=30'."

Further ordered, That in pursuance of its consent and agreement as stated in the petition herein, the New York, Lackawanna and Western Railroad Company shall assume, pay, and discharge the entire cost and expense of the construction and work herein authorized and provided for, including the cost of any lands, rights, or easements necessary or required for the purpose of carrying out the provisions of this order, and of any land or other damages whatsoever which may arise by virtue hereof: this order being granted upon the express condition that no financial liability or obligation whatsoever shall attach to or fall upon the State of New York or the town of York on account of the acquisition of lands, rights, or easements necessary or required, the construction and work, or for any other incidental expenses herein authorized and provided for.

The acceptance of this order by the New York, Lackawanna

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and Western Railroad Company shall be deemed as an undertaking on its part to save the State of New York, this Commission, and the town of York harmless from all costs, expenses, claims, or demands whatsoever on account of this order and of any of the provisions thereof.

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In the Matter of the COMPLAINT OF RESIDENTS OF BARDONIA,  
ROCKLAND COUNTY, against WELLS, FARGO & COMPANY EXPRESS,  
as to Discontinuance of the Bardonia Express Station

Case No. 5427

(Public Service Commission, Second District, July 10, 1916)

Proceeding to compel the Wells, Fargo & Company Express to re-establish its office at a hamlet in Rockland county where the company claims it would be compelled to do business at a loss.

Certain residents of Bardonia, in the county of Rockland, have entered this complaint against Wells, Fargo & Company Express because of the recent discontinuance of the company's office at that place. Bardonia is on the Piedmont branch of the Erie railroad and contains only seventy-three people. Formerly the express office was located in a general store kept by one DeMontreville, where the railroad station is also located. Mr. DeMontreville was formerly the express agent, working under a 10 per cent commission on the express business he handled. His compensation on a commission basis not proving satisfactory to him, he requested to be paid on a monthly basis and this request being denied he resigned as agent and the office was discontinued. *Held*, that it would be an injustice to compel the express company to do business at a loss and since it was unable to find any one to take the position at the old rate, it was justified in ceasing operations in Bardonia.

**BY THE COMMISSION.**— This is a complaint by residents of Bardonia, Rockland county, against Wells, Fargo & Company Express, arising out of the recent discontinuance of an express station formerly maintained at Bardonia. Bardonia is a small community on the Piedmont branch of the Erie railroad; its population is said to number seventy-three people. The railroad maintains no regular station there on its own property, but the general store owned by a Mr. DeMontreville is used as a railroad

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station, under an agreement between Mr. DeMontreville and the railroad company. Prior to February fifth of this year Mr. DeMontreville's store was also used as an express office by the Wells, Fargo Company. Mr. DeMontreville, as agent of the express company, was paid a 10 per cent commission on the express business he handled. His compensation on a commission basis amounted to about fifty dollars or sixty dollars a year, and last winter he asked that his compensation be placed on a basis of ten dollars per month. This was refused, and Mr. DeMontreville resigned as agent. On account of this severance of relations, there is now no express agent at Bardonia. The express company is willing to retain Mr. DeMontreville in that capacity, under the old arrangement, or are willing to employ someone else, but no one can be found to take the place. It appears from the testimony given at the hearing in the case that the 10 per cent commission basis upon which Mr. DeMontreville has heretofore been compensated is the usual one in the case of commission agents throughout this express company's territory. In some cases less is paid, but never more. Upon the volume of express business at Bardonia the testimony shows that a substantial loss to the company at the Bardonia office would result if a ten dollar monthly salary was paid to the express agent there. There are other express stations near Bardonia — at Nanuet, about two miles away and at West Nyack, about a mile and a half distant.

The principal complainant in the present case is a market gardener who ships vegetables to New York during the summer months. His place of business is about 200 feet distant from Mr. DeMontreville's store, and he was formerly in the habit of delivering his shipments to Mr. DeMontreville at the store, by wagon or by wheelbarrow. He now has to drive either to Nanuet or West Nyack, between both of which places and Bardonia there are good highways.

The attitude of the express company is not one of unwillingness to maintain an express station at Bardonia. It states that it is willing to continue the old arrangement with Mr. DeMontreville or to enter into a similar arrangement with any other responsible person. But it objects to establishing a different condition in

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Bardonia from that which exists elsewhere throughout its territory under substantially similar circumstances.

The Commission does not feel that it would be justified, in this case, in compelling the express company to comply with Mr. De-Montreville's demands as to compensation. The circumstances of the case do not seem to warrant such a decision on our part. It is, of course, desirable that an express office should, if possible, be maintained at Bardonia, and the Commission feels justified in urging upon the company that it continue its efforts to make arrangements with a suitable person to act as express agent there. It does not feel, however, that it should at this time undertake to fix such agent's salary at a figure out of line with what has been the regular practice of the company in all similar situations. Therefore, it is hereby

Ordered, That this complaint be, and the same hereby is, dismissed and that this case be closed upon the records of the Commission.

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In the Matter of the Petition of CHATHAM ELECTRIC LIGHT, HEAT AND POWER COMPANY, Under Section 68 of the Public Service Commissions Law, for Permission to Construct Extensions of Its Electric Lines in Columbia County, and for Approval of the Exercise of Rights and Privileges Under Franchises Received from Towns

Case No. 5570

(Public Service Commission, Second District, July 10, 1916)

**Application for permission to construct extension of its lines by an electric light, heat and power company in various towns in Columbia county.**

The Chatham Electric Light, Heat and Power Company asks for permission to construct in several towns in Columbia county electric plants and extensions of lines and for approval of local franchises from such towns. Application granted.

BY THE COMMISSION.—A petition, under section 68 of the Public Service Commissions Law having been filed with this Commission by Chatham Electric Light, Heat and Power Company,

for permission to construct in various towns in Columbia county, electric plants and extensions of its lines, and for approval of the exercise of rights and privileges under franchises received from the towns; and public notice of the pendency of said petition having been published in various newspapers in the locality; and a public hearing on said petition, after due notice, having been held in Albany, at which Sanford W. Smith appeared for the company and no one else appeared, and no one having opposed this petition; and this Commission hereby determining from the papers and hearing that such construction and exercise of franchises are necessary and convenient for the public service, it is ordered

1. That this Commission, under section 68 of the Public Service Commissions Law, hereby permits and approves construction by Chatham Electric Light, Heat and Power Company, in the portion of the town of Chatham, Columbia county, in this sentence named, of an electric plant, including poles, wires, conduits and appurtenances, for transmitting and furnishing to the public electricity for light, heat or power, and hereby permits and approves the exercise by Chatham Electric Light, Heat and Power Company of rights and privileges under a franchise to use the public streets, highways and public places in all that portion of the town of Chatham lying south of and east of the Kinderhook creek, and also in all that territory, a part of the said town of Chatham, embraced within the limits of school district No. 11 of said town, as the said school district at this time is constituted, for constructing therein poles, wires, conduits and appurtenances for transmitting and furnishing to the public electricity for light, heat or power, received by Chatham Electric Light, Heat and Power Company from the town board of the town of Chatham, Columbia county, and concurred in by the town superintendent of highways of said town, a copy of which franchise, granted March 14, 1916, by the town board, certified by Harry M. Dardess, clerk of said town, to be a true copy, is filed with this Commission with the papers in this case, there being also filed with the papers, an original dated March 14, 1916, of the concurrence of the town superintendent of highways.

2. That this Commission, under section 68 of the Public Service



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Commissions Law, hereby permits and approves construction by Chatham Electric Light, Heat and Power Company, in the town of Austerlitz, Columbia county, of an electric plant, including poles, wires, conduits and appurtenances, for transmitting and furnishing to the public electricity for light, heat or power, and hereby permits and approves the exercise by Chatham Electric Light, Heat and Power Company of rights and privileges under a franchise to use all of the streets, highways and public places of said town for constructing therein poles, wires, conduits and appurtenances for transmitting and furnishing to the public electricity for light, heat or power, received by Chatham Electric Light, Heat and Power Company from the town board of the town of Austerlitz, Columbia county, and concurred in by the town superintendent of highways of said town, a copy of which franchise, granted August 23, 1915, by the town board, certified by D. W. Lasher, clerk of said town, to be a true copy, is filed with this Commission with the papers in this case, there being also filed with the papers an original, dated March 15, 1916, of the concurrence of the town superintendent of highways.

3. That this Commission, under section 68 of the Public Service Commissions Law, hereby permits and approves construction by Chatham Electric Light, Heat and Power Company, in the portion of the town of Claverack, Columbia county, in this sentence named, of an electric plant, including poles, wires, conduits and appurtenances, for transmitting and furnishing to the public, electricity for light, heat or power, and hereby permits and approves the exercise by Chatham Electric Light, Heat and Power Company of rights and privileges under a franchise to use the public streets, highways and public places in that portion of the said town of Claverack between the unincorporated village or hamlet of Mellenville or the incorporated village of Philmont, or both, and the town boundary line at or near Tipple's Crossing (so called), for constructing therein poles, wires, conduits and appurtenances for transmitting and furnishing to the public electricity for light, heat or power, received by Chatham Electric Light, Heat and Power Company from the town board of the town of Claverack, Columbia county, and concurred in by the

town superintendent of highways of said town, a copy of which franchise, granted December 4, 1915, by the town board, certified by Ward Magley, clerk of said town, to be a true copy, is filed with this Commission with the papers in this case, there being also filed with the papers, an original dated May 5, 1916, of the concurrence of the town superintendent of highways.

4. That this Commission, under section 68 of the Public Service Commissions Law, hereby permits and approves construction by Chatham Electric Light, Heat and Power Company, in the town of Hillsdale, Columbia county, of an electric plant, including poles, wires, conduits and appurtenances, for transmitting and furnishing to the public electricity for light, heat or power, and hereby permits and approves the exercise by Chatham Electric Light, Heat and Power Company of rights and privileges under a franchise to use all of the streets, highways and public places of said town for constructing therein poles, wires, conduits and appurtenances for transmitting and furnishing to the public electricity for light, heat or power, received by Chatham Electric Light, Heat and Power Company from the town board of the town of Hillsdale, Columbia county, and concurred in by the town superintendent of highways of said town, a copy of which franchise, granted October 18, 1915, by the town board, certified by Harry D. Cornell, clerk of said town, to be a true copy, is filed with this Commission with the papers in this case, there being also filed with the papers an original, dated April 10, 1916, of the concurrence of the town superintendent of highways.

5. That this Commission, under section 68 of the Public Service Commissions Law, hereby permits and approves construction by Chatham Electric Light, Heat and Power Company, in the portion of the town of Taghkanic, Columbia county, in this sentence named, of an electric plant, including poles, wires, conduits and appurtenances, for transmitting and furnishing to the public electricity for light, heat or power, and hereby permits and approves the exercise by Chatham Electric Light, Heat and Power Company of rights and privileges under a franchise to use the public streets, highways and public places in school district No. 1 of the town of Taghkanic and joint school district No. 4 of the towns of Hillsdale

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Public Service Commission, Second District

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and Taghkanic, for constructing therein poles, wires, conduits and appurtenances for transmitting and furnishing to the public electricity for light, heat or power, received by Chatham Electric Light, Heat and Power Company from the town board of the town of Taghkanic, Columbia county, and concurred in by the town superintendent of highways of said town, a copy of which franchise, granted November 6, 1915, by the town board, certified by A. P. Woodward, clerk of said town, to be a true copy, is filed with this Commission with the papers in this case, there being also filed with the papers, an original dated April 15, 1916, of the concurrence of the town superintendent of highways.

6. That this Commission, under section 68 of the Public Service Commissions Law, hereby permits and approves construction by Chatham Electric Light, Heat and Power Company, in the town of Copake, Columbia county, of an electric plant, including poles, wires, conduits and appurtenances, for transmitting and furnishing to the public electricity for light, heat or power, and hereby permits and approves the exercise by Chatham Electric Light, Heat and Power Company of rights and privileges under a franchise to use all of the streets, highways and public places of said town for constructing therein poles, wires, conduits and appurtenances for transmitting and furnishing to the public electricity for light, heat or power, received by Chatham Electric Light, Heat and Power Company from the town board of the town of Copake, Columbia county, and concurred in by the town superintendent of highways of said town, a copy of which franchise, granted October 18, 1915, by the town board, certified by S. A. McIntyre, clerk of said town, to be a true copy, is filed with this Commission with the papers in this case, there being also filed with the papers an original, dated April 8, 1916, of the concurrence of the town superintendent of highways.

7. That this order is not intended to and shall not be construed to authorize any construction work in or upon any state or county highway unless and until consent to and approval of such construction work shall have first been duly given by the State Commission of Highways.

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Public Service Commission, Second District

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In the Matter of the Petition of the TOWN BOARD OF WARSAW, WYOMING COUNTY, Under Section 62 (Now Section 91) of the Railroad Law for the Elimination of a Highway Grade Crossing of the Erie Railroad Known as Clark's Crossing in Said Town

Case No. 277

(Public Service Commission, Second District, July 11, 1916)

**Elimination of highway grade crossing on a highway leading from the village of Warsaw to North Gainesville.**

On June 30, 1916, a hearing was had in this matter at which a proposed method of elimination was shown. Such grade crossing directed to be closed and discontinued, traffic to be diverted therefrom to a new overhead crossing to be constructed 300 feet east of the grade crossing now existing.

By THE COMMISSION.— Under this petition the Commission is asked to determine that public safety requires the abolition of a grade crossing locally known as Clark's crossing, of the Erie railroad by a highway leading from the village of Warsaw to North Gainesville, the highway travel to be carried over the grade of the railroad by means of the construction of an overgrade crossing and approaches thereto.

A hearing on this application was held by the Commission at Buffalo on June 30, 1916, at which W. S. Gouinlock, supervisor, and A. W. Fisher and H. R. Bristow, members of the town board of the town of Warsaw; W. E. Webster, president of the village of Warsaw; C. H. Greff and Elliott Smith, members of the village board of the village of Warsaw; and T. H. Burgess, attorney for the Erie Railroad Company, appeared; at which time due proof of publication of the notice of this hearing and of personal service of such notice on all the interested property owners as prescribed by statute was made, and at which a general plan, marked "Respondent's Ex. No. 1," was presented by the Erie Railroad Company, showing a proposed method of elimination which met with the approval of the Erie Railroad Company and

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Public Service Commission, Second District

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the representatives of the town board. This plan provides for the construction of an overgrade crossing at right angles to the railroad, located about 300 feet east of the existing grade crossing, and approaches on each side of the railroad connecting with the existing highway and a private drive on the south side of the tracks leading to the property of Frank Wickwire. The Commission has determined that the petition be granted, and therefore

Ordered, That the grade crossing known as Clark's crossing of the Erie railroad in the town of Warsaw, Wyoming county, be closed and discontinued, and that travel be diverted therefrom to a new overgrade crossing to be constructed at a point about 300 feet easterly of the existing grade crossing, substantially in accordance with the plan heretofore referred to marked "Respondent's Ex. No. 1" and entitled "Erie R. R., Buffalo Division. Proposed Overhead Crossing at Clark's Crossing, Warsaw, N. Y. Scales as shown. M. P. 372.21. Jan. 26, 1916. Office of Assistant Engineer."

The structure carrying the highway over the railroad shall be of steel, in three spans, with a total length of approximately ninety-four feet, with its axis at right angles to the alignment of the railroad tracks. The bridge is to have a solid floor, the roadway thereon to be eighteen feet clear in width, paved with waterbound macadam about six inches thick. The approaches are to be built to a width of not less than twenty-four feet, and railings are to be constructed thereon at all points where the embankment is two feet or more in height; the distance between railings to be not less than twenty-two feet. The pavement on the approaches is to be of gravel laid to a depth of about six inches and a width of fourteen feet.

The alignment of the center line of the revised highway shall be as follows: Beginning at a point in the center line of the existing highway about 300 feet northerly from the center of the existing grade crossing, measured along the existing highway, thence curving to the left (easterly) on a radius of about 115 feet a distance of about 90 feet; thence tangent to the above named curve a distance of about 220 feet; thence curving to the right on a radius of 100 feet a distance of about 115 feet; thence tangent

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across the railroad tracks to a junction with the existing highway on the south side of the track.

Beginning at the point of diversion on the north side of the railroad, the grade on the revised highway shall ascend at the rate of 10 per cent to the bridge; thence continuing to ascend on the northerly span at the rate of about 4 per cent; thence level across the center span; thence descending on the southerly span and southerly approach at the rate of about 3.76 per cent to an intersection with the existing highway surface on the south side of the tracks.

The necessary grading shall be performed to connect with the existing highway for the purpose of forming a connection with the private driveway now leading westerly from the existing grade crossing.

The grade crossing and the approaches thereto shall be left open and maintained until the completion and approval by this Commission of the work herein ordered, after which the grade crossing shall be closed by the construction of fences or other barriers across the highway.

In this order the railroad is assumed to be located in an easterly and westerly direction.

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In the Matter of the Petition of INTERNATIONAL RAILWAY COMPANY, Under Section 55, Public Service Commissions Law, for Authority to Issue \$1,175,000 in 5 Per Cent Bonds Under Its Refunding and Improvement Mortgage

Case No. 5617

(Public Service Commission, Second District, July 11, 1916)

Application by a railway company for permission to issue \$1,175,000 face value of 5 per cent fifty-year bonds under its certain improvement mortgage.

The original petition was filed by the International Railway Company June 26, 1916, and the report of the division of steam railroads thereon was made to the Commission under date of June 29, 1916. Upon the petition a report of the company is hereby authorized to issue the bonds as herein requested, such bonds being under a certain indenture dated

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Public Service Commission, Second District

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November 1, 1912, given to the Bankers Trust Company, as trustee, to secure the authorized issue of a total face value of \$60,000,000. The \$1,175,000 of bonds to be sold at not less than 89 per cent of their face value and accrued interest to give net proceeds of \$1,045,750.

Petition filed June 26, 1916.

Report of division of steam railroads dated June 29, 1916.

By THE COMMISSION.—Now, therefore, upon the foregoing record, ordered as follows:

1. That the International Railway Company is hereby authorized to issue \$1,175,000 face value of its 5 per cent fifty-year refunding and improvement mortgage gold bonds under a certain indenture dated November 1, 1912, given to the Bankers Trust Company, as trustee, to secure an authorized issue of a total face value of \$60,000,000.

2. That said bonds of the total face value of \$1,175,000 shall be sold for not less than 89 per cent of their face value and accrued interest to give net proceeds of \$1,045,750.

3. That said bonds of the face value of \$1,175,000 so authorized or the proceeds thereof to the amount of \$1,045,750 shall be used solely and exclusively for the additional expenditures on the new extension of the railroad of the petitioner from Buffalo to Niagara Falls which aggregate \$1,177,151 as detailed in Exhibit "A" attached to the petition filed herein June 26, 1916, or in the event of any necessary change or changes in the present plans of the petitioner, for expenditures on account of such extension other than those limited in such schedule which are properly capitalizable, in so far as the same may be applicable, provided:

(1) That such bonds or the proceeds thereof shall be applied on such new construction only in so far as the same is a real increase in the fixed capital of the petitioner and not a replacement of any part of such fixed capital or substitution for wasted capital or other less property chargeable to income in accordance with the definitions contained in the uniform system of accounts for street railroad corporations adopted by this Commission.

(2) That there shall be no charges to fixed capital on account of engineering services in connection with such construction unless

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such engineering services shall have been rendered either by other than the regular officers and employees of the corporation, or, in a proper case where such services may have been rendered by certain of such officers or employees, under an express assignment to such construction or improvement work.

(3) That if there shall be required for the aforesaid purposes subject to the limitations herein contained, a sum less than the proceeds realized from the bonds herein authorized, no portion of the proceeds of the bonds herein authorized over the actual proceeds thereof so required shall be used for any purpose without the further order of this Commission.

(4) That the proceeds realized from the sale of bonds herein authorized, until used for the authorized purpose, shall be either deposited to the credit of the company in a special bank account or otherwise kept separately. The purpose and intent of this provision is to require the segregation of bond proceeds from the company's other cash so that a trial balance of the company's accounts at any time will show the extent to which its balance of cash is contracted for for the purposes enumerated herein for which the proceeds of bonds are authorized.

4. That if the said bonds of a total face value of \$1,175,000 herein authorized shall be sold at such price as will enable the company to realize net proceeds of more than \$1,177,151 no portion of the proceeds of such sale in excess of the last aforesaid sum shall be used for any purpose without an express order of the Commission.

5. That none of the said bonds herein authorized shall be hypothecated or pledged as collateral by the International Railway Company unless any such pledge or hypothecation shall have been expressly approved and authorized by this Commission.

6. That the International Railroad Company shall for each six months' period ending December thirty-first and June thirtieth file not more than thirty days from the end of such period a verified report showing:

(a) What bonds have been sold or otherwise disposed of during such period in accordance with the authority contained herein, and the date of such sale or disposition;



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- (b) To whom such bonds were sold;
- (c) What proceeds were realized from such sale;
- (d) Any other terms and conditions of such sale;
- (e) The amount expended in reasonable detail of the proceeds for the purpose specified herein during such periods, and stating to what account or accounts such expenditures have been charged.
- (f) A summary showing the distribution by prescribed accounts of the expenditures during such period.

In reporting under subdivision (f) of this clause there shall be further shown the expenditures of the proceeds of the bonds herein authorized to the beginning of the period reported on and a total showing the expenditures to the end of the period together with a statement of the balances in the fixed capital accounts as of the beginning and ending of such period.

Such reports shall continue to be filed until all of said bonds shall have been sold or disposed of and the proceeds expended in accordance with the authority contained herein, and if during any period no bonds were sold or disposed of or proceeds thereof expended the report shall set forth such fact.

7. That the authority contained in this order to issue bonds is upon the express condition that the petitioner accepts and agrees to comply in good faith with the provisions hereof and before any bonds are issued pursuant hereto and within thirty days of the service hereof, the said company shall file with the Commission a satisfactory verified stipulation duly authorized by its board of directors accepting this order with all of its terms and conditions, and such order shall be void and of no force or effect until such stipulation shall have been filed as required herein.

Finally, it is determined and stated, That in the opinion of the Commission the money to be procured by the issue of said bonds herein authorized is reasonably required for the purpose specified in this order and that such purpose is not in whole or in part reasonably chargeable to operating expenses or to income.

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Public Service Commission, Second District

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**In the Matter of the PETITION OF EMPIRE COKE COMPANY, Under Section 69, of the Public Service Commissions Law, for Authority to Issue \$90,000 in Preferred Capital Stock, and Under Section 70, of the Public Service Commissions Law, for Authority to Acquire \$93,700 Capital Stock of the Seneca Power Corporation**

Case No. 5595

(Public Service Commission, Second District, July 11, 1916)

**Application by Empire Coke Company to acquire capital stock of Seneca Power Corporation at not more than par value thereof.**

The Empire Coke Company authorized, upon its petition filed June 10, 1916, to issue \$90,000 par value of its preferred capital stock to be used either for the purpose of even exchange, par for par, for the common capital stock of the Seneca Power Corporation or for the sale at not less than par, the proceeds to be used exclusively for the purchase of the Seneca Power Corporation stock at par.

**BY THE COMMISSION.— Ordered as follows:**

1. That the Empire Coke Company is hereby authorized to acquire and hold \$93,700 par value of the common capital stock of the Seneca Power Corporation, provided, however, that the cost to it of such stock shall not be in excess of the par value thereof acquired.

2. That the Empire Coke Company is hereby authorized to issue \$90,000 par value of its preferred capital stock, which shall be used either for the purpose of even exchange on the basis of par for par for the common capital stock of the Seneca Power Corporation or for sale at not less than its par value, the proceeds of which sale shall be used solely and exclusively for the purchase of the common capital stock of the Seneca Power Corporation at its par value.

3. That the Empire Coke Company shall for each six months' period ending December thirty-first and June thirtieth file not more than thirty days from the end of such period a verified report showing:

(a) What stock has been exchanged or sold during such period in accordance with the authority contained herein and the dates of such exchanges or sales.

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- (b) With whom or to whom such stock was exchanged or sold.
- (c) What proceeds were realized from such sales.
- (d) Full particulars of the use made of such stock if exchanged, or full particulars of the use made of the proceeds of all sales of such stock.

- (e) Any other terms and conditions of such exchanges and sales.

Such reports shall continue to be filed until all of said stock herein authorized shall have been exchanged or sold and the proceeds thereof disposed of in accordance with the authority contained herein, and if during any period no stock was exchanged or sold or proceeds thereof expended, the report shall set forth such fact.

4. That the Empire Coke Company shall within thirty days of the service of this order advise the Commission whether or not it accepts the same with all its terms and conditions.

Finally, it is determined and stated, That in the opinion of the Commission the capital stock herein authorized to be issued and sold is reasonably required for the purposes specified in this order and that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

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In the Matter of the Petition of NIAGARA, LOCKPORT AND ONTARIO POWER COMPANY, Under Section 68 of the Public Service Commissions Law, for Permission to Construct in the Incorporated Village of Skaneateles, Onondaga County, Poles, Wires and Appurtenances for Transmitting and Furnishing Electricity to the Village Power Station Alone; and for Approval of the Exercise of a Franchise Received from the Village

Case No. 5466

(Public Service Commission, Second District, July 11, 1916)

Authority asked for change of the route of electric lines in the village of Skaneateles.

An order was made by the Commission on April 6, 1916, approving the construction of a transmission line at Skaneateles, for the purpose

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of furnishing current to the village power station alone. The routes of such transmission lines having been changed so as to follow other streets in that village with the consent of the village trustees, the present application, made under date of June 6, 1916, for approval of such changes, granted by the Commission, with the provision that no poles, wires or other structures shall be placed upon, along or across any State or county highway without the consent of the state commissioner of highways.

By THE COMMISSION.—April 6, 1916, an order was made herein by which it was sought to approve the commencement of construction of a transmission line into the village of Skaneateles to the sub-station of the municipal electric plant for the purpose of furnishing current to the village power station alone, and to approve the exercise of a franchise therefor granted by the village board March 2, 1916. A change having been made in the route of the said transmission line necessitating the use of other streets in said village; and the board of trustees of said village of Skaneateles having amended the said franchise under date of May 29, 1916, and an application having been made to this Commission under date of June 8, 1916, asking for permission to construct under said amended franchise and approval thereof, a public hearing thereon was held in the city of Auburn July 7, 1916, at which no one appeared in opposition to the application. It appearing that the use of the streets named in the amended franchise is necessary for the construction of said transmission line, the ordering part of the order of this Commission dated April 6, 1916, is hereby amended to read as follows:

It is determined and stated, That the construction of said plant and the exercise of said franchises are necessary and convenient for the public service and it is —

Ordered, 1. That the permission and approval of the Commission be given to Niagara, Lockport and Ontario Power Company, under section 68 of the Public Service Commissions Law, to construct, maintain and operate the necessary poles, wires, cables, appliances and structures, in, through, upon and across the following highways at approximately the points hereinafter mentioned, not for the purpose of furnishing light or power within the village

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Public Service Commission, Second District

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of Skaneateles, but for the sole purpose of transmitting electric power to the village power station for delivery and sale to the village of Skaneateles itself for its municipal plant:

*Franchise of March 2, 1916:*

Across Elizabeth street near its intersection with Griffin street;

Across Griffin street at the north end near its intersection with Elizabeth street and along the easterly side of Griffin street from its intersection with said Elizabeth street to a point just south of the north line of the property of Joseph and Anita Murray;

Across Kelly street just southwest of the southeasterly line of Skaneateles Outlet.

*Franchise of May 29, 1916:*

Across Elizabeth street, near the division line between William H. Harris and Francis Dickinson;

Along and across Griffin street at any points between Elizabeth and Hannum streets;

Along and across Hannum street at any points between Griffin street and the southeasterly line of property owned by the Skaneateles Creamery Company.

2. That the permission and approval of the Commission be given to said Niagara, Lockport and Ontario Power Company, to exercise the rights and privileges conferred by said franchises granted by the village board of the village of Skaneateles March 2, 1916, and May 29, 1916, subject, however, to all the terms and conditions thereof.

3. No poles, wires or other structures shall be placed upon, along, or across any state or county highway without the consent of the state commissioner of highways.

Public Service Commission, Second District

In the Matter of the Petition of the LONG ISLAND LIGHTING COMPANY, Under Section 69 of the Public Service Commissions Law, for Authority to Issue \$92,000 in 5 Per Cent Twenty-five-Year First Mortgage Gold Bonds Under an Existing Mortgage, and \$80,000 Additional Common Capital Stock

Case No. 5561

(Public Service Commission, Second District, July 11, 1916)

Application by an electric lighting company for authority to issue certain of its 5 per cent twenty-five-year first mortgage bonds for purposes specifically set forth.

The Long Island Lighting Company, under an indenture of March 1, 1911, is authorized to issue \$92,000 face value of its 5 per cent twenty-five-year first mortgage sinking fund gold bonds under a certain indenture of that date, given to the Mercantile Trust Company, as trustee, to secure an authorized issue of a total face value of \$6,000,000. The bonds herein authorized shall be sold for not less than 92 per cent of their face value and accrued interest to give net proceeds of \$84,640. The petition herein was filed on May 15, 1916, and the report of the electrical engineer was made June 21, 1916, and a memorandum of the division of capitalization was submitted to the Commission July 5, 1916. Permission granted with the usual restrictions.

BY THE COMMISSION.—Now, therefore, upon the foregoing record, ordered as follows:

1. That the Long Island Lighting Company is hereby authorized to issue \$92,000 face value of its 5 per cent twenty-five-year first mortgage sinking fund gold bonds under a certain indenture dated March 1, 1911, given to the Mercantile Trust Company, as trustee, to secure an authorized issue of a total face value of \$6,000,000.

2. That the Long Island Lighting Company is hereby authorized to issue \$80,000 par value of its common capital stock, which shall be sold at a price not less than the par value thereof to give net proceeds of at least . . . . . \$80,000

3. That said bonds of the total face value of \$92,000 shall be sold for not less than 92 per cent of their face value and accrued interest to give net proceeds of at least . . . . . 84,640

\$164,640

## Public Service Commission, Second District

4. That said securities of the total face and par value of \$172,000 so authorized or the proceeds thereof to the amount of \$164,640 shall be used solely and exclusively for the following purposes:

(a) For additions and improvements:

1. Northport Station . . . . .	\$104,096 51
2. Northport District, including four miles of distribution main circuit, etc. . . . .	10,523 49
3. Sayville District, including four miles of distribution main circuit, etc. . . . .	10,020 00

As detailed in Exhibit 1 of the petition herein. \$124,640 00

(b) Working capital . . . . . 40,000 00

\$164,640 00

in so far as the same may be applicable, provided:

(1) That such stock and bonds or the proceeds thereof shall be applied on such new construction summarized in subdivision (a) hereof only in so far as the same is a real increase in the fixed capital of the petitioner and not a replacement of any part of such fixed capital or substitution for wasted capital or other loss properly chargeable to income, in accordance with the definitions contained in the uniform system of accounts for electrical corporations adopted by this Commission.

(2) That there shall be no charges to fixed capital on account of engineering services in connection with such construction unless such engineering services shall have been rendered either by other than the regular officers and employees of the corporation, or, in a proper case where such services may have been rendered by certain of such officers or employees, under an express assignment to such construction or improvement work.

(3) That if there shall be required for the aforesaid purposes, subject to the limitations herein contained, a sum less than an amount equal to the face and par value of the stock and bonds herein authorized, no portion of the proceeds of the stock and bonds herein authorized over the actual proceeds thereof so

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required shall be used for any purpose without the further order of this Commission.

(4) That such working capital shall not be disbursed by such company for purposes properly chargeable to income, but shall be retained to enable the company to carry its accounts receivable and to provide a sufficient amount of materials and supplies to economically transact its business.

(5) That the proceeds realized from the sale of stock and bonds herein authorized, until used for the authorized purposes, shall be either deposited to the credit of the company in a special bank account or otherwise kept separately. The purpose and intent of this provision is to require the segregation of stock and bond proceeds from the company's other cash so that a trial balance of the company's accounts at any time will show the extent to which its balance of cash is contracted for for the purposes enumerated herein, for which the proceeds of stock and bonds are authorized.

5. That if the said securities of a total face and par value of \$172,000 herein authorized shall be sold at such price as will enable the company to realize net proceeds of more than \$164,640, no portion of the proceeds of such sale in excess of the last afore-said sum shall be used for any purpose without the further order of this Commission.

6. That none of the said bonds herein authorized shall be hypothecated or pledged as collateral by the Long Island Lighting Company unless any such hypothecation or pledge shall have been expressly approved and authorized by this Commission.

7. That the Long Island Lighting Company shall for each six months' period ending December thirty-first and June thirtieth file not more than thirty days from the end of such period a verified report showing:

(a) What securities have been sold or otherwise disposed of during such period in accordance with the authority contained herein and the date of such sale or disposition.

(b) To whom such securities were sold.

(c) What proceeds were realized from such sale.

(d) Any other terms and conditions of such sale



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Public Service Commission, Second District

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(e) The amount expended in reasonable detail of the proceeds for the purposes specified herein during such periods, and stating to what account or accounts such expenditures have been charged.

(f) A summary of the expenditures for each of such purposes during the period covered by the report.

(g) A summary showing the distribution by accounts provided in the uniform system of accounts of the expenditures during such period.

In reporting under subdivisions (f) and (g) of this clause there shall be further shown the expenditures of the proceeds of securities herein authorized to the beginning of the period reported on and a total showing the expenditures to the end of the period, together with a statement of the balances in the fixed capital accounts as of the beginning and ending of such period.

Such reports shall continue to be filed until all of said securities shall have been sold or disposed of and the proceeds expended in accordance with the authority contained herein, and if during any period no securities were sold or disposed of or proceeds thereof expended the report shall set forth such fact.

8. That the authority contained in this order to issue securities is upon the express condition that the petitioner accepts and agrees to comply in good faith with the provisions hereof, and before any securities are issued pursuant hereto and within thirty days of the service hereof, the same company shall file with this Commission a satisfactory verified stipulation duly authorized by its board of directors, accepting this order with all its terms and conditions, and such order shall be void and of no force or effect until such stipulation shall have been filed as required herein.

Finally, it is determined and stated, That in the opinion of this Commission the money to be procured by the issue of said securities herein authorized is reasonably required for the purposes specified in this order and that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

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Public Service Commission, Second District

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In the Matter of the Petition of the EMPIRE GAS AND ELECTRIC COMPANY and the EMPIRE COKE COMPANY for Authority under Section 69 of the Public Service Commissions Law, to Issue \$72,000 of their Joint First Mortgage 5 per cent Gold Bonds

Case No. 4883

(Public Service Commission, Second District, July 13, 1916)

Application by a gas and electric light company for permission to issue 5 per cent thirty-year joint first and refunding mortgage gold bonds for certain specified purposes.

On September 14, 1915, the Empire Gas and Electric Company was authorized to issue and sell at not less than 85 per cent of their face value \$72,000 face value of its 5 per cent thirty-year joint and refunding mortgage gold bonds. These bonds have been sold as authorized, but expenditures for certain purposes have proved to be more and other expenditures have proved to be less than those authorized in the original order, and this application is made for a redistribution of the purposes for which the security proceeds were authorized, to agree with the actual expenditures. The electrical and gas engineers of the Commission, in their reports dated March 24 and May 10, 1916, respectively, recommended that such redistribution be ordered.

BY THE COMMISSION.—By order entered herein September 14, 1915, the Empire Gas and Electric Company was authorized to issue and sell at not less than 85 per cent of their face value \$72,000 face value of its 5 per cent thirty-year joint first and refunding mortgage gold bonds and to use the proceeds realized from the sale thereof for new construction as detailed in Schedule "A" attached to the petition filed February 23, 1915. From verified reports filed in accordance with the requirements of such order, it appears that all of the bonds so authorized have been sold, \$52,000 at 86 per cent of their face value and \$20,000 at 90 per cent of their face value, and net proceeds of \$62,720 have been realized. The petitioner has, however, reported expenditures in some instances for more and others for less than the amounts specifically authorized in such order, and by supplemental petition, filed January 27, 1916, asks for a redistribution of the purposes for which the security proceeds were authorized to agree with the actual expenditures. The supplemental petition has been referred to the electrical and gas engineers of the Commission, who in

## Public Service Commission, Second District

their reports dated March 24 and May 10, 1916, respectively, recommend that the desired authority be granted. Now, therefore, upon the foregoing record, ordered,

1. That ordering clauses Nos. 2 and 3 of the order heretofore entered herein on the 14th day of September, 1915, are hereby modified and amended by the substitution therefor of the following:

2. That the bonds of the total face value of \$72,000 so authorized, \$52,000 thereof shall be sold at 86 per cent of their face value and accrued interest, and \$20,000 at 90 per cent of their face value and accrued interest to give net proceeds of \$62,720.

3. That said bonds of the face value of \$72,000 so authorized or the proceeds thereof to the amount of \$62,720 shall be used solely and exclusively for new construction summarized as follows:

*Electric Department*

Land devoted to electric operations..	\$266 92
General structures .....	1,613 76
General equipment .....	4,691 60
Power plant buildings.....	763 01
Furnaces, boilers and accessories...	152 88
Electric generators .....	36 66
Accessory electric power equipment.	307 35
Miscellaneous power plant equipment	80 55
Substation buildings .....	135 08
Substation equipment .....	916 12
Poles and fixtures.....	2,895 70
Underground conduits .....	217 92
Transmission system .....	6,954 51
Distribution system (overhead)...	4,564 68
Distribution system (underground).	6,130 53
Line transformers and devices.....	7,267 96
Electric services .....	2,368 96
Electric meters .....	2,638 15
Electric meter installation.....	35 73
Municipal street lighting system...	3,007 04
Electric laboratory equipment.....	71 08

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\$45,116 19

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*Gas Department*

General structures .....	\$13,503 79	
General store equipment.....	75 46	
Works and station structures.....	150 60	
Holders.....	111 39	
Accessory equipment at works.....	960 32	
Trunk lines and mains.....	20,401 83	
Gas service .....	3,677 66	
Gas meters.....	4,051 64	
Gas meter installation .....	66 09	
Gas tools and implements.....	4 48	
Gas laboratory equipment.....	134 26	
District steam heating.....	3,859 20	
		\$46,996 72
		\$92,112 91
Amount unprovided for.....		\$29,392 91

in so far as the same may be applicable, provided:

(a) That such bonds or the proceeds thereof shall be applied on such new construction only in so far as the same is a real increase in the fixed capital of the petitioner and not a replacement of any part of such fixed capital or substitution for wasted capital or other less properly chargeable to income, in accordance with the definitions contained in the uniform system of accounts for electrical and gas corporations adopted by this Commission.

(b) That there shall not be expended for any of such purposes a sum in excess of the amount set opposite such purpose.

(c) That there shall be no charges to fixed capital on account of service, engineering, supervision, or other items of like nature, in connection with such construction, except in so far as the same shall be performed by other than the regular officers and employees of the company, or by such officers and employees who have been especially assigned to such construction work. No allowance is included herein, nor shall the proceeds herein authorized be expended for incidental services of the officers and employees of

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Public Service Commission, Second District

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the petitioner, nor for the payment of any arbitrary percentage of operating expenses or income charges to cover the petitioner's estimate of the elements of the cost of such projects not charged originally to fixed capital, but made to operating expenses as had been its custom to December 31, 1913, and to that date allowed by this Commission on the express condition that the petitioner discontinue the making of such charges since that date and base fixed capital charges only on direct costs properly substantiated.

(d) That if there shall be required for any of the aforesaid purposes, subject to the limitations herein contained, a sum less than the amount set opposite thereto, no portion of said amount over the actual cost thereof so required shall be used for any purpose without the further order of this Commission.

Finally, it is determined and stated, That in the opinion of this Commission the use of the proceeds of bonds heretofore authorized and partially issued is reasonably required for the purposes specified in this order and that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

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In the Matter of the Petition of SILVER CREEK ELECTRIC COMPANY, under Section 69 of the Public Service Commissions Law, for Authority to Issue \$7,000 in 5 Per Cent Forty-Year Gold Bonds under an Existing First Mortgage for \$150,000

Case No. 5581

(Public Service Commission, Second District, July 13, 1916)

Permission granted to an electric plant to issue certain bonds under an existing first mortgage.

The petition herein was filed with the Commission on May 26, 1916. referred to the electrical engineer, who reported thereon June 29, 1916. From the petition and the report it appeared that a 5 per cent forty-year first mortgage gold bond issue existed under a certain indenture dated May 1, 1916, given to the Fidelity Trust Company of Buffalo, as trustee, to secure an authorized issue of a total face value of \$150,000. The present application is for authority to issue \$7,000 face value of these gold bonds under the existing mortgage. Permission granted with the usual restrictions.

Public Service Commission, Second District

BY THE COMMISSION.—1. That the Silver Creek Electric Company is hereby authorized to issue \$7,000 face value of its 5 per cent forty year first mortgage gold bonds under a certain indenture dated May 1, 1916, given to the Fidelity Trust Company of Buffalo, as trustee, to secure an authorized issue of a total face value of \$150,000.

2. That said bonds of the total face value of \$7,000 shall be sold for not less than 80 per cent of their face value and accrued interest to give net proceeds of at least \$5,600.

3. That said bonds of the face value of \$7,000 so authorized or the proceeds thereof to the amount of \$5,000 shall be used solely and exclusively for the construction of a street lighting system in the village of Silver Creek, N. Y., as detailed in Exhibit "A" of the petition herein, \$7,008.12. Amount unprovided for, \$1,408.12, in so far as the same may be applicable, provided:

(1) That such bonds or the proceeds thereof shall be applied on such new construction summarized above only in so far as the same is a real increase in the fixed capital of the petitioner and not a replacement of any part of such fixed capital or substitution for wasted capital or other loss properly chargeable to income, in accordance with the definitions contained in the uniform system of accounts for electrical corporations adopted by this Commission.

(2) That there shall be no charges to fixed capital on account of engineering services in connection with such construction unless such engineering services shall have been rendered either by other than the regular officers and employees of the corporation, or, in a proper case where such services may have been rendered by certain of such officers and employees under an express assignment to such construction or improvement work.

(3) That if there shall be required for the aforesaid purpose, subject to the limitations herein contained, a sum less than an amount equal to the face value of the bonds herein authorized, no portion of the proceeds of the bonds herein authorized over the actual proceeds thereof so required shall be used for any purpose without the further order of this Commission.

(4) That the unit prices contained in Exhibit "A" of the petition are not intended to be and must not be construed by the

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Public Service Commission, Second District

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petitioner as having been determined upon by this Commission as the actual cost of the property and work to be acquired and done and thus properly chargeable to fixed capital, but are intended and shall be construed only to be a present estimate of the probable cost of such property and work, the actual cost of which must be actual expenditures made as defined by the Commission's uniform system of accounts for electrical corporations.

(5) That the proceeds realized from the sale of bonds herein authorized, until used for the authorized purposes, shall be either deposited to the credit of the Company in a special bank account or otherwise kept separately. The purpose and intent of this provision is to require the segregation of bond proceeds from the company's other cash so that a trial balance of the company's accounts at any time will show the extent to which its balance of cash is contracted for for the purposes enumerated herein for which the proceeds of bonds are authorized.

4. That if the said bonds of a total face value of \$7,000 herein authorized shall be sold at such price as will enable the company to realize net proceeds of more than \$7,008.12, no portion of the proceeds of such sale in excess of the last aforesaid sum shall be used for any purpose without the further order of this Commission.

5. That none of the said bonds herein authorized shall be hypothecated or pledged as collateral by the Silver Creek Electric Company unless any such hypothecation or pledge shall have been expressly approved and authorized by this Commission.

6. That the Silver Creek Electric Company shall for each six months period ending December thirty-first and June thirtieth file not more than thirty days from the end of such period a verified report showing:

(a) What bonds have been sold or otherwise disposed of during such period in accordance with the authority contained herein and the date of such sale or disposition.

(b) To whom such bonds were sold.

(c) What proceeds were realized from such sale.

(d) Any other terms and conditions of such sale.

(e) The amount expended in reasonable detail of the proceeds for the purpose specified herein during such period and stating

to what account or accounts such expenditures have been charged.

(f) A summary showing expenditures during such period by the prescribed accounts.

In reporting under subdivision (f) of this clause there shall be further shown the expenditures of the proceeds of the bonds herein authorized to the beginning of the period reported on and a total showing the expenditures to the end of the period, together with a statement of the balances in the fixed capital accounts as of the beginning and ending of such period.

Such reports shall continue to be filed until all of said bonds shall have been sold or disposed of and the proceeds expended in accordance with the authority contained herein and if during any period no bonds were sold or disposed of or proceeds expended, the report shall set forth such fact.

7. That the authority contained in this order to issue bonds is upon the express condition that the petitioner accepts and agrees to comply in good faith with the provisions hereof and before any bonds are issued pursuant hereto and within thirty days of the service hereof, the said company shall file with this Commission a satisfactory verified stipulation, duly authorized by its board of directors, accepting this order with all its terms and conditions, and such order shall be void and of no force or effect until such stipulation shall have been filed as required herein.

Finally, it is determined and stated, That in the opinion of this Commission the money to be procured by the issue of said bonds herein authorized is reasonably required for the purpose specified in this order and that such purpose is not in whole or in part reasonably chargeable to operating expenses or to income.



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Public Service Commission, Second District

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In the Matter of the Joint Petition of FRED SPRAGUE and JAMESTOWN LIGHTING AND POWER COMPANY, under Section 70 of the Public Service Commissions Law, for Consent to the Transfer from Sprague to the Company of the Works and System of an Electric Plant in Falconer

Case No. 5610

(Public Service Commission, Second District, July 18, 1916)

**Sale of electric light plant in Falconer, N. Y., from an individual to Jamestown Lighting and Power Company.**

Fred Sprague and the Jamestown Lighting and Power Company united in a joint petition for authority for the transfer of the entire electric lighting system at Falconer, consisting of a distribution system, works, lines, wires, poles, transformers and leaders, and also of all franchises, property and equipment connected with the said system to the lighting and power company. A hearing was had upon due notice and as the result of said hearing the Commission ordered that permission and approval be given to Fred Sprague, aforesaid, to transfer and deliver to the Jamestown Lighting and Power Company and for the latter to purchase and pay the sum of \$8,995 therefor.

BY THE COMMISSION.—The petitioners in this case filed their petition with the Commission on the 15th day of June, 1916, asking for permission, the petitioner, Fred Sprague, to sell his entire electric lighting system, located in the village of Falconer, and consisting of a distribution system, works, lines, wires, poles, transformers and leaders and also all franchises, property and equipment connected with said system, to the petitioner, Jamestown Lighting and Power Company; and a notice having been duly published, pursuant to an order of this Commission, in the *Jamestown Evening Journal*, the *Jamestown Evening News* and the *Jamestown Morning Post*, that a hearing on said petition would be held by the Commission at its office in the city of Buffalo on the 8th day of July, 1916, at eleven o'clock A. M., at which time and place the said hearing was held; and at which said hearing Mr. Clifford J. Lipp, secretary and treasurer of the Jamestown Lighting and Power Company, appeared on behalf of said petitioners, and there being no other appearances on behalf of any party; and certain proofs and proceedings having been

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Public Service Commission, Second District

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thereupon taken and had whereby it satisfactorily appears that the petitioner, Fred Sprague, is an individual who for some years has maintained and operated an electric lighting works and system in the village of Falconer, under and pursuant to a franchise heretofore lawfully granted to him for that purpose; that he has no generating plant, but has purchased electric power from the petitioner, Jamestown Lighting and Power Company, which generates its own power and has delivered such power to said Sprague, from its transmission and distribution lines in the said village of Falconer; that the said works and system of said Sprague are reasonably worth the sum of \$8,995, for which he is willing to sell the same to the said Jamestown Lighting and Power Company, and the latter is willing to pay that sum therefor; that recently this Commission approved of the operation of a franchise granted to the said petitioner, Jamestown Lighting and Power Company, by the village authorities of Falconer for the purpose of furnishing light, heat and power to the said village and its inhabitants, and it was then contemplated that the said company was about to take over the works and system of said Sprague so that there would be no undue competition for the limited amount of business in said village between the two petitioners herein; that the petitioner, Jamestown Lighting and Power Company, is a domestic corporation and is now operating its electric plant and plants in the city of Jamestown, and other municipalities adjacent to said city including that portion of the town of Busti between the city of Jamestown and the village of Falconer, which is not more than three miles in extent, and it being deemed advantageous to said company to continue its service into the said village of Falconer; it is therefore ordered:

1. That permission and approval are hereby given to the petitioners herein, the said Fred Sprague, to sell, transfer and deliver to the said Jamestown Lighting and Power Company, and for the latter to purchase and pay the sum of \$8,995, for all the distribution system, works, lines, wires, poles, transformers, leaders, franchises and all other property and equipment belonging to or connected with the electric lighting plant of the said Fred Sprague in the said village of Falconer.

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Public Service Commission, Second District

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2. That the said Fred Sprague is hereby authorized to make, execute and deliver to the said Jamestown Lighting and Power Company any and all transfers, assignments and conveyances for such plant, system, franchises and property, as may be necessary, upon receiving the said payment of \$8,995 in cash.

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In the Matter of the Petition of the NIAGARA AND ERIE POWER COMPANY, under Section 68 of the Public Service Commissions Law, for Permission to Construct in the Incorporated Village of North Collins, Erie County, an Electric Plant, Including Poles, Wires, Conduits and Appurtenances for Transmitting and Furnishing to the Public Electricity for Light, Heat or Power; and for Approval of a Franchise Therefor Received from the Village

Case No. 5543

(Public Service Commission, Second District, July 18, 1916)

**Construction of an electric plant in North Collins, Erie county.**

The Niagara and Erie Power Company petitioned for leave to construct an electric plant for transmitting and furnishing electricity in the village of North Collins, Erie county, and for the approval of local franchises for the use of the village streets and highways. A hearing was had in relation to the matter on June 30, 1916, at Buffalo and as a result the Commission ordered that the Niagara and Erie Power Company be authorized to make the necessary extension, the order being with the usual restrictions.

BY THE COMMISSION.—The petitioner, Niagara and Erie Power Company, filed its petition in this proceeding on the 29th day of April, 1916, for permission to construct its electrical plant, including poles, wires, cables, conduits, subways, appliances and structures for transmitting and furnishing electricity in the village of North Collins, Erie county, and for approval of the exercise of a franchise to use streets, highways and public places therefor, received from the president and board of trustees of said village, and dated February 26, 1915; thereafter a notice was duly published in accordance with the rules of this Commission for all persons knowing any reason why said petition should not be

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Public Service Commission, Second District

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granted to file the same with the secretary of the Commission, on or before the 18th day of May, 1916; and proof of the publication of said notice having been duly filed, and a hearing having been duly held herein by the Commission in the city of Buffalo on the 30th day of June, 1916, at which hearing Mr. Elton H. Beals, of the firm of Strebel, Corey, Tubbs & Beals, of Buffalo, appeared as attorney for the petitioner, and Mr. E. C. Lawton, of Buffalo, also appeared on behalf of the State Commission of Highways; and certain proofs and proceedings having been thereupon taken and had whereby it satisfactorily appears that the petitioner is a domestic corporation and is desirous of extending its service and constructing and operating its electrical distribution plant in accordance with the said franchise therefor, received from the authorities of the village of North Collins, and to construct, maintain and operate all necessary poles, wires, cables, conduits, subways, appliances, structures and appurtenances in, through, upon, under and across all of the streets, highways, alleys and public ways in the said village of North Collins, Erie county, for the purpose of using, distributing and furnishing electricity for light, heat and power to the said village of North Collins and the inhabitants thereof; and the said franchise having been presented to and filed with the Commission at said hearing;

And from all of such papers, proofs and proceedings, it being hereby determined that the construction of said electrical plant, and the exercise of said franchise therefor, are necessary and convenient for the public service; it is therefore ordered:

(1) That permission and approval are hereby given to Niagara and Erie Power Company to construct, maintain and operate the said electrical plant and all necessary poles, wires, cables, conduits, subways, appliances, structures and appurtenances in, through, upon, under and across all of the streets, highways, alleys and public ways in the said village of North Collins for the purpose of using, distributing, transmitting and furnishing electricity for light, heat and power to the said village of North Collins and the inhabitants thereof as specifically provided in said franchise.

(2) That permission and approval are hereby given to the

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Public Service Commission, Second District

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said Niagara and Erie Power Company to exercise all the rights and privileges conferred by the said franchise so granted by the said president and board of trustees of the village of North Collins on the 26th day of February, 1915, subject to and in accordance with all the terms, conditions, limitations and restrictions of said franchise.

(3) No poles, wires, cables, conduits, subways, appliances, structures or appurtenances herein authorized shall be placed over or across any state or county highway without first obtaining the consent of the State Commission of Highways.

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**In the Matter of the Petition of the DEPEW AND LANCASTER LIGHT, POWER AND CONDUIT COMPANY, under Section 69 of the Public Service Commissions Law, for Authority to Issue \$72,000 First Mortgage 5 Per Cent Forty-Year Gold Bonds under an Existing Mortgage for \$1,000,000**

Case No. 5589

(Public Service Commission, Second District, July 20, 1916)

**Application of the Depew and Lancaster Light, Power and Conduit Company to issue certain bonds under an existing mortgage.**

The Depew and Lancaster Light, Power and Conduit Company asks authority to issue \$72,000 face value of its 5 per cent forty-year first mortgage gold bonds, under a certain indenture bearing date of August 1, 1914, given to the Fidelity Trust Company of Buffalo, to secure an authorized issue of a total face value of \$1,000,000. The petition herein was filed on June 6, 1916, referred to the electrical engineer and reported on by him June 30, 1916, and by the gas engineer July 7, 1916. Application granted with the usual restrictions.

**By THE COMMISSION.**—Now, therefore, upon the foregoing record, ordered as follows:

1. That the Depew and Lancaster Light, Power and Conduit Company is hereby authorized to issue \$72,000 face value of its 5 per cent forty-year first mortgage gold bonds under a certain

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Public Service Commission, Second District

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indenture dated the 1st day of August, 1914, given to the Fidelity Trust Company of Buffalo to secure an authorized issue of a total face value of \$1,000,000.

2. That said bonds of the total face value of \$72,000 shall be sold for not less than 80 per cent of their face value and accrued interest to give net proceeds of at least \$57,600.

3. That said bonds of the face value of \$72,000 so authorized or the proceeds thereof to the amount of \$57,000 shall be used solely and exclusively for the following purposes:

(a) Extensions to improvements and betterments of the street lighting and commercial systems of the petitioner in the town of West Seneca and generally throughout its system, as detailed in Exhibit A attached to the petition herein .....	\$82,353 75
(b) Insurance and taxes during construction . . . . .	1,200 00
(c) Legal expenses .....	2,500 00
(d) Engineering and superintendence. ....	3,970 38
	<hr/>
	\$90,024 13
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Amount unprovided for .....	\$32,424 13
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in so far as the same may be applicable, provided:

(1) That such bonds or the proceeds thereof shall be applied on such new construction summarized in subdivision (a) hereof only in so far as the same is a real increase in the fixed capital of the petitioner and not a replacement of any part of such fixed capital or substituted for wasted capital or other loss properly chargeable to income in accordance with the definitions contained in the uniform systems of accounts for gas and electrical corporations adopted by this Commission.

(2) That there shall be no charge to fixed capital on account of engineering services in connection with such construction unless

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Public Service Commission, Second District

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such engineering services shall have been rendered either by other than the regular officers and employees of the corporation, or, in a proper case where such services may have been rendered by certain of such officers or employees, under an express assignment to such construction or improvement work.

(3) That if there shall be required for the aforesaid purposes subject to the limitations herein contained, a sum less than an amount equal to the face value of the bonds herein authorized, no portion of the proceeds of the bonds herein authorized over the actual proceeds thereof so required shall be used for any purpose without the further order of the Commission.

(4) That the unit prices contained in Exhibit A of the petition are not intended to be and must not be construed by the petitioner as having been determined upon by the Commission as the actual cost of the property and work to be acquired and done and thus properly chargeable to fixed capital, but are intended and shall be construed only to be a present estimate of the probable cost of such property and work, the actual cost of which must be actual expenditures made as defined by the Commission's uniform systems of accounts for gas and electrical corporations.

(5) That the proceeds realized from the sale of bonds herein authorized, until used for the authorized purposes, shall be either deposited to the credit of the company in a special bank account or otherwise kept separately. The purpose and intent of this provision is to require the segregation of bond proceeds from the company's other cash so that a trial balance of the company's accounts at any time will show the extent to which its balance of cash is contracted for for the purposes enumerated herein for which the proceeds of bonds are authorized.

4. That if the said bonds of a total face value of \$72,000 herein authorized shall be sold at such price as will enable the company to realize net proceeds of more than \$72,000, no portion of the proceeds of such sale in excess of the last aforesaid sum shall be used for any purpose without the further order of the Commission.

5. That none of the said bonds herein authorized shall be hypothecated or pledged as collateral by the Depew and Lancaster Light, Power and Conduit Company unless any such pledge or

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Public Service Commission, Second District

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hypothecation shall have been expressly approved and authorized by this Commission.

6. That the Depew and Lancaster Light, Power and Conduit Company shall for each six months' period ending December thirty-first and June thirtieth file not more than thirty days from the end of such period a verified report showing:

(a) What bonds have been sold or otherwise disposed of during such period in accordance with the authority contained herein and the date of such sale or disposition;

(b) To whom such bonds were sold;

(c) What proceeds were realized from such sale;

(d) Any other terms and conditions of such sale;

(e) In detail the amount expended for each of the purposes specified herein during such period of the proceeds of the bonds herein authorized, and such report shall show for each of said purposes to what account or accounts under the uniform systems of accounts for gas and electrical corporations the expenditures for such purposes have been charged;

(f) A summary of the expenditures for each of such purposes during the period covered by the report;

(g) A summary showing the expenditures during such period by the prescribed accounts;

(h) The amount remaining unexpended of the proceeds of the bonds sold to be used for the purposes authorized herein, which amount shall be the balance at that date in the special deposit which is to be established in accordance with the requirements of subdivision (5) of ordering clause No. 3 of this order.

In reporting under subdivisions (f) and (g) of this clause there shall be further shown the expenditures of the proceeds of the bonds herein authorized to the beginning of the period reported upon and a total showing such expenditures to the end of the period, together with a statement of the balances in the fixed capital accounts as of the beginning and ending of such period.

Such reports shall continue to be filed until all of said bonds shall have been sold or disposed of and the proceeds expended in accordance with the authority contained herein, and if during any period no bonds were sold or disposed of or proceeds expended, the report shall set forth such fact.



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Public Service Commission, Second District

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7. That the authority contained in this order to issue bonds is upon the express condition that the petitioner accepts and agrees to comply in good faith with the provisions hereof and before any bonds are issued pursuant hereto and within thirty days from the service hereof, the said company shall file with the Commission a satisfactory verified stipulation duly authorized by its board of directors accepting this order with all its terms and conditions, and such order shall be void and of no force or effect until such stipulation shall have been filed as required herein.

Finally, it is determined and stated, That in the opinion of the Commission the money to be procured by the issue of said bonds herein authorized is reasonably required for the purposes specified in this order and that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

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In the Matter of the Petition of the STATE COMMISSION OF HIGHWAYS, under Section 81 of the Railroad Law, for the Elimination of Three Grade Crossings of the New York, Ontario and Western Railway on County Highway Petition No. 3112 in the Town of Delhi, Delaware County

Case No. 5081

(Public Service Commission, Second District, July 25, 1916)

**Petition of State Commission of Highways for the elimination of certain grade crossings.**

The elimination of the grade crossings referred to in this proceeding is asked for by the State Commission of Highways, the facts being as follows: In the town of Delhi, Delaware county, the New York, Ontario and Western Railway Company's Delhi branch is crossed at grade four times by a highway known as County Highway Petition No. 3112. This highway the Commission proposes to improve. There is also a town highway known as the Peak's Brook road. The Highway Commission desires to eliminate the three crossings upon the county highway and to construct a new road which will have effect of entirely eliminating the Peak's Brook crossing. Permission granted with the usual restrictions.

BY THE COMMISSION.— In the town of Delhi, Delaware county, the New York, Ontario and Western Railway Company's Delhi branch is crossed at grade four times by a highway known as County Highway Petition No. 3112, which the Highway Commission has designated for improvement. In addition to these crossings, there is another crossing at grade on a town highway known as the Peak's Brook road, which branches from and leads northerly from the county highway. The State Commission of Highways has come before this Commission under a petition asking for the elimination of the crossings upon the county highway, it being proposed to construct a new road between the two extreme crossings entirely on one side of the railroad, such construction having the effect of entirely eliminating the Peak's Brook crossing. It is further proposed, as shown by a plan presented and by evidence taken at a hearing before this Commission on March 31, 1916, to leave the most easterly crossing of the county highway, known as Clark's crossing, as a public way, in order to permit access to Sherwood's bridge over the Delaware river and the highway passing thereover. The effect of the elimination project, however, will be to divert all through and a considerable part of local highway traffic from this crossing, thus greatly reducing the risks now assumed by both the public and the railroad company. The proposition therefore is to divert a large percentage of the travel from one crossing (Clark's) on the county highway, eliminate entirely three crossings, Upper Sherwood, Lower Sherwood, and Fraser's, on the county highway, and eliminate one crossing on the Peak's Brook road. Embraced within the elimination area there are ten private crossings. These crossings it is proposed to retain for the use of property owners adjacent to the railroad, and to provide for such changes in the approaches thereto or in the manner of crossing as the changed highway location and its elevation require.

Upon this petition this Commission held a hearing at Albany on March 31, 1916, at which the following appeared: F. A. Hermans, bridge engineer, and F. J. Mulvaney, county assistant engineer, for the State Commission of Highways; C. L. Andrus, attorney, and J. H. Nuelle, chief engineer, for the New York,

## Public Service Commission, Second District

Ontario and Western Railway Company; John Chambers, chairman board of supervisors; H. S. Marvin, supervisor; and R. W. Siver, supervisor, for the town of Delhi; Russell Archibald, trustee for the village of Delhi; A. L. Van Tassle, superintendent of highways; S. F. Adee and John W. Gibson in person; H. G. Hewitt for J. E. Clark, W. H. Harder, and John D. Little, property owners; and George A. Fisher, who appeared tentatively for Mrs. Margaret Sherwood Patterson and Miss Marjorie Patterson, property owners. At this hearing proof of publication of notice of hearing and of service thereof on interested property owners was made.

A further hearing to determine the manner in which the cost of paving the new highway shall be borne was held at Albany on July 14, 1916, at which appeared F. J. Mulvaney, county assistant engineer, and E. E. Brandow, assistant engineer for the State Commission of Highways; C. L. Andrus and J. H. Nuelle, respectively attorney and chief engineer, for the railroad corporation; Supervisors Chambers, Martin, and Siver for the town of Delhi; Trustee Archibald for the village of Delhi; and A. L. Van Tassle, county superintendent of highways. The representatives of the railroad corporation contended that the entire paving cost should be borne by the State, but finally agreed that the cost of paving up to the sum of \$12,000, may be charged against the elimination project, and that one-half of such cost within the limit mentioned shall be borne by the railroad corporation: the understanding being that if the cost of such paving shall exceed the sum of \$12,000 all of such excess cost shall be borne and paid for by the State Commission of Highways. It is furthermore understood that certain existing private ways across the railroad shall be maintained, or where by reason of topographical conditions or otherwise such crossings properly must be disturbed others similar thereto shall be provided: all as hereinafter specifically set forth and provided for. In view of the foregoing, and after due consideration and deliberation, the Commission has determined that the petition herein shall be granted, and accordingly it is hereby

Ordered: 1. That the grade crossings of the New York, Ontario and Western railway on County Highway Petition No.

3112, in the town of Delhi, Delaware county; known as Lower Sherwood's, Upper Sherwood's, and Fraser's crossings, and a grade crossing of said railway on a town highway known as the Peak's Brook crossing, be closed and discontinued, and that travel be diverted therefrom to a new highway to be constructed north of and generally following the alignment of the railway track from a point in the present highway distant about 630 feet easterly of Clark's crossing, to a point in the highway distant about 300 feet westerly from Fraser's crossing, a total length measured on the alignment of said new highway of about 13,930 feet. The exact location of this new highway shall be as shown upon a portfolio of plans marked "Exhibit A" on file with this Commission, said location being that established and proposed by the State Commission of Highways.

The profile of the finished grade of the new highway and the dimensions governing the construction shall be substantially in accordance with the grades and dimensions shown upon the various plans embraced in "Exhibit A" hereinbefore referred to.

Ordered: 2. That except as hereafter described the existing private crossings of the railway herein referred to are to be maintained, and the roadways leading thereto are to be graded on the north side of the tracks so as to permit their crossing under the new highway or to join the same at grade, in accordance with the following schedule:

(a) Clark's crossing, leading to Clark's gravel pit: roadway to be carried under the proposed grade of the new highway.

(b) A structure under the railway located at the property of Mrs. Patterson, accommodating the drainage from the north, is also occasionally used for a cattle-pass: a similar structure under the grade of the new highway the size of which shall be substantially the same as that of the existing structure under the railway shall be provided.

(c) Patterson Farm grade crossing: roadway to be graded on the north of the railroad to meet the new highway surface.

(d) Crossing at grade opposite the property of John Little: roadway to be graded on the north of the railway to meet the new highway grade. This crossing is designed to be used by the

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Public Service Commission, Second District

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property owners Little, Burdick, and Bishop. An agreement for such joint use shall if possible be effected; failing in which, other provision shall be made for the necessities of the case, under further application to and through determination by this Commission.

(e) Undergrade crossing at lands of John E. Little: on account of the prohibitive grades that would be involved, it will be impracticable to grade an approach from the existing private undergrade crossing to the new highway surface. No such connection need therefore be constructed; means of crossing the track for property owner Little to be provided by crossing as herein described in paragraph (d).

(f) Crossing at lands of William Coe and Daniel Shaw: roadway to be graded on the north side of the railway to join the new highway at grade. An agreement for the joint use of this crossing by Shaw and Coe shall if possible be effected; failing in which, other provision shall be made for the necessities of the case, under further application to and through determination by this Commission.

(g) Undergrade crossing opposite the lands of Alexander Anderson: roadway to be graded on the north side of the railway to join the new highway at grade.

(h) A new crossing immediately west of Peak's Brook crossing to give access from the Snyder property to the new highway shall be constructed, Snyder now being accommodated by one of the highway crossings which by this order is to be closed. The northerly approach to the new private crossing shall be graded to join the new highway at grade.

(i) Crossing at lands of W. H. Harder: roadway to be graded on the north side of the railway to join the new highway at grade.

(j) Private crossing about 800 feet easterly of the Fraser grade crossing: the northerly approach to be graded to join the new highway surface at grade.

Ordered: 3. Before actually entering upon any construction work incidental to any of the before mentioned private crossings, or any work which would be affected by any change in the plans at this time tentatively approved, for the construction of such

Public Service Commission, Second District

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private crossings, the railroad corporation shall apply to this Commission for formal approval of definite and precise plans and specifications for the construction of said private crossings and each and every of them.

Ordered: 4. That in accordance with the agreement between the parties in respect of the cost of paving as hereinbefore set forth, only the actual cost of paving as the same shall be determined in the final accounting herein, at not to exceed \$12,000, shall be charged against the elimination project; and that any and all paving cost in excess of the last mentioned sum shall be charged against and paid for by the State Commission of Highways.

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In the Matter of the Petition of the HOMER AND CORTLAND GAS LIGHT COMPANY under Section 69, Public Service Commissions Law, for Authority to Issue \$25,000 Common Capital Stock; Also for Cancellation of Authority to Issue \$8,400 Mortgage Bonds (Case 3488)

Case No. 5455

(Public Service Commission, Second District, July 25, 1916)

**Application of a gas light company for leave to issue \$25,000 common capital stock and also to issue certain mortgage bonds.**

The Homer and Cortland Gas Light Company filed its petition herein on March 1, 1916, and the report of the division of capitalization on such petition was made April 20, 1916, that of the gas engineer was made April 25, 1916, and the final report of the division of capitalization was made May 22, 1916, and to this report the company filed comments under date of June 7, 1916, and an amended final report of the capitalization division was filed July 21, 1916. Upon these facts application granted with the usual restrictions.

By THE COMMISSION.— Now, therefore, upon the foregoing record, ordered as follows:

1. That the proposed journal entries contained in the amended final report of the division of capitalization in this proceeding dated July 24, 1916, which on July 24, 1916, was sent to the corporation, such entries being listed on pages 11 to 13 inclusive

## Public Service Commission, Second District

thereof, shall be entered upon the books of the Homer and Cortland Gas Light Company, and that within thirty days from the service of this order verified proof shall be submitted to the Commission that such entries have been made.

2. That the order heretofore entered in Case No. 3488 on the 28th day of August, 1913, as amended on January 22, 1914, is hereby further amended to authorize the issuance of \$14,000 face value of 5 per cent forty-year mortgage bonds and \$23,400 par value of capital stock, and the use of the proceeds of such securities for the purposes specified therein, and the authorization to issue and sell \$8,400 of bonds in addition thereto is hereby vacated.

3. That the Homer and Cortland Gas Light Company is hereby authorized to issue \$25,000 par value of its common capital stock, which shall be sold at a price not less than the par value thereof to give net proceeds of at least \$25,000.

4. That said stock of the par value of \$25,000 so authorized or the proceeds thereof to the amount of \$25,000 shall be used solely and exclusively for the following purposes:

(a) For the discharge of obligations

outstanding at December 31, 1915,

as detailed in Exhibit B attached to

the petition herein, or their renewals \$10,059 02

(b) For working capital ..... 15,000 00

\$25,059 02

Amount unprovided for ..... \$59 02

in so far as the same is made applicable, provided:

(1) That if there shall be required for the aforesaid purposes subject to the limitations herein contained, a sum less than an amount equal to the par value of the stock herein authorized, no portion of the proceeds of the stock herein authorized over the actual proceeds thereof so required shall be used for any purpose without the further order of this Commission.

(2) That such working capital shall not be disbursed by such company for purposes properly chargeable to income, but shall

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be retained to enable the company to carry its accounts receivable and to provide a sufficient amount of materials and supplies to economically transact its business.

(3) That the proceeds realized from the sale of stock herein authorized, until used for the authorized purposes, shall be either deposited to the credit of the company in a special bank account or otherwise kept separately. The purpose and intent of this provision is to require the segregation of stock proceeds from the company's other case so that a trial balance of the company's accounts at any time will show the extent to which its balance of cash is contracted for for the purposes enumerated herein for which the proceeds of stock are authorized.

5. That the Homer and Cortland Gas Light Company shall for each six months' period ending December thirty-first and June thirtieth file not more than thirty days from the end of such period a verified report showing:

(a) What stock has been sold, exchanged or otherwise disposed of during such period in accordance with the authority contained herein and the date of such sale or disposition.

(b) To whom such stock was sold.

(c) What proceeds were realized from such sale.

(d) Any other terms and conditions of such sale.

(e) In detail the amount expended for the purposes specified herein during such period of the proceeds of the stock herein authorized, and such report shall show for such purposes to what account or accounts under the uniform system of accounts for gas corporations the expenditures for such purposes have been charged.

(f) The amount remaining unexpended of the proceeds of stock sold to be used for the purposes authorized herein, which amount shall be the balance at that date in the special deposit which is to be established in accordance with the requirements of subdivision 3 of ordering clause No. 4 of this order.

Such reports shall continue to be filed until all of said stock shall have been sold or disposed of and the proceeds expended in accordance with the authority contained herein, and if during any period no stock was sold or disposed of or proceeds expended, the report shall set forth such fact.



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6. That the authority contained in this order to issue stock is upon the express condition that the petitioner accepts and agrees to comply in good faith with the provisions hereof and before any stock is issued pursuant hereto and within thirty days from the service hereof, the said company shall file with the Commission a satisfactory verified stipulation duly authorized by its board of directors accepting this order with all its terms and conditions, and such order shall be void and of no force or effect until such stipulation shall have been filed as required herein.

7. It is nevertheless expressly provided that in all respects other than as directed in ordering clause No. 1 hereof, this order shall not be effective, and particularly that no stock shall be issued or sold hereunder by the applicant, nor shall the issue or sale of any such stock be deemed to have been approved and authorized by this Commission unless and until compliance with the requirements of ordering clause No. 1 of this order shall have been made, reported to and approved as sufficient by this Commission.

Finally, it is determined and stated, That in the opinion of the Commission the money to be procured by the issue of said stock herein authorized is reasonably required for the purposes specified in this order and that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

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In the Matter of the Complaint of RESIDENTS OF THE HAMLET OF WEST FALLS, Town of Aurora, Erie County, against BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY, as to Location of New Station Building Proposed to Be Built

Case No. 4942

(Public Service Commission, Second District, July 26, 1916)

Primal right of railroad corporation to determine upon the location of its station subject only to the requirements of section 50 of the Public Service Commissions Law.

The Buffalo, Rochester and Pittsburgh Railway runs substantially north and south through the westerly part of the town of Aurora,

## Public Service Commission, Second District

where it has maintained a station upon its own property for many years in the hamlet of West Falls. Two years ago the station building burned and the railroad company prepared plans for rebuilding the same. At about the same time several residents of the community petitioned the Public Service Commission to require the railroad company to change the location of its station, on the ground that the old site was inadequate for the proper facilities of such station and station lay-out. Other residents protested against such change. For a long time, while these proceedings were pending and hearings were held, the railroad company maintained a neutral attitude in the matter, desiring to have the people of West Falls come to an agreement as to the station location, but they remained about equally divided on that question. The proponents of the new site have tendered to the railroad company without cost a well located lot of land consisting of about two acres, and are willing to bear the entire expense of a new public highway and sidewalk leading to the new site from a state highway. Such new site is about a quarter of a mile from the old site, measured along the railroad, and about one-half mile by way of the highways. The old site is located on the brick state highway.

At the last hearing in this case, the railroad company filed plans for extensions and improvements to the old site which will render the same adequate and convenient for the company and the traveling public.

All these facts and circumstances have been carefully considered by the Commission, and it is *Held*, that the company itself has the first right to determine upon the location of its station, provided, always, that the requirements of section 50 of the Public Service Commissions Law are fairly complied with; and this is so, even though the Commission is satisfied, for sentimental or other reasons, that the station should go to another place; the provisions of this statute are absolutely controlling in this case, for it is there that the Commission finds its only authority to intervene in matters of this kind; "convenience to the public" and "adequate service and facilities for the transportation of passengers and property" are the only subjects of inquiry delegated to the Commission; and although they are simple in statement, they are broad and comprehensive in their scope, and are of such paramount importance that all other questions must be considered as relating to non-essentials.

*Also held*, that the Commission should approve the determination of the railroad company to utilize, extend and improve its present station site according to the plans thereof filed with the Commission, and the application that the station be moved to the new site is accordingly denied.

Kellogg & Baker (Francis F. Baker, of counsel) and Philip A. Sullivan, Buffalo, attorneys for the petitioners for new station site.

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Clinton, Clinton & Striker (George Clinton, Jr., of counsel), Buffalo, and C. S. McDougall, West Falls, attorneys for the petitioners for old station site.

William C. Holmes, Hoyt Henshaw, Nelson P. Hinkley, and M. L. Doty, of West Falls, petitioners for and against the change.

Havens & Havens (Samuel M. Havens, of counsel), Rochester, attorneys for Buffalo, Rochester and Pittsburgh Railway Company.

Hodson, Commissioner.—The Buffalo, Rochester and Pittsburgh Railway runs substantially north and south through the westerly part of the town of Aurora, Erie county, and has two stations in that territory, known as West Falls and Jewettville, which are about a mile apart measuring along the track. West Falls is a small unincorporated village containing several hundred inhabitants, many of whom are summer residents only, who do business in Buffalo, and rely upon the trains of such railway company in traveling between West Falls and Buffalo, a distance of about seventeen miles. Such train service is very satisfactory to the commuters, as well as to those who permanently reside in the locality of the station sites, which are under consideration in this case. As a matter of fact, such service has become so reliable and satisfactory that it is a very material factor in the rapid growth and development of West Falls as a place for suburban homes of people who do business in the city of Buffalo. The railway company has maintained station facilities at West Falls for many years, and its business there, both passenger and freight, is quite considerable. The station building was destroyed by fire about two years ago, since which time the company has utilized a freight car for station purposes on the site of the old building. New conveniences must be provided for the traveling public, and the company has been ready for some time to construct a new station building, the plans for which everybody in the village seems to approve; but the same has not been proceeded with because of a controversy between the patrons of the road, who

are seriously divided on the question of the location of the new station.

The company prepared the plans for the new building without being urged by anyone, but halted the work as soon as it was requested to give a hearing as to a change of site, although everything was in readiness to proceed with such new building and the general station lay-out on the old site. Hearings were given, public meetings were held, and negotiations were had by the proponents of a new site, to which opposition was made by those in favor of the old site. The two sites are not more than a-quarter of a mile apart along the railroad track, but are about a-half a mile from each other by way of the public highway.

While these proceedings were going on, the railway company refrained from taking any steps toward constructing a new station; and on May 4, 1915, a petition, signed by eighty people, who describe themselves as patrons of the respondent at West Falls, was filed with the Commission, asking that the new site be designated by the Commission, upon which the company should be required to build its new station, alleging, among other things, that the ground therefor had been donated to the company, and that such location is more central, and better facilities can be provided there than at the old site. In due time, the company filed its answer with the Commission, and, although such answer set out facts which made an issue of the allegations of the petition, and asked that the petition be denied, the company postponed such improvements until the case could be heard and determined; and it must be said that the same fair and neutral attitude has been maintained by the respondent during the pendency of this case and at the several hearings until after the contending parties had rested their case at the hearing at West Falls on the 19th day of July, 1915. On more than one occasion, however, the representatives of the railway company have expressed their preference for the old site, believing, as they say, that the old location being on an improved highway and having been established for many years, with its passing and loading sidings, and station appurtenances, the change would entail great and unnecessary cost to the company, and inconvenience to a large number

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of the people of West Falls; these and other features of the scheme proposed by those in favor of the new site, have been carefully considered by the engineering, operating and traffic departments of the railway company, and they have all determined, as stated in the answer, that the station should be built on the old site. And yet, in the face of all this, the company, with an apparent desire to serve the best interests of the people of West Falls, was represented by its counsel and officials at all of the hearings before the Commission, and did not take any formal position for or against the claims of either party until the hearing at Buffalo, June 23, 1916. The proof presented by the parties at the first and second hearings tended to show that the property of the railway company, constituting the old site, is not large enough nor wide enough for a convenient and adequate station lay-out; that it is triangular in shape, and located between and at the junction of the railway tracks and the brick highway; the greater part of it slopes down to the highway at a considerable grade, which renders it inaccessible from the lower side, unless a passageway should be constructed up the embankment, the elevation of which is about seventeen feet above the surface of the highway at the point where it is proposed to build the new station. These matters were pointed out by the Commissioner in charge, who stated that, for these and other reasons, the Holmes site is preferable to the old one, but that, in the matter of access to the station by public highways, the old site has the preference because it is convenient to an improved state road, while there are no such means of reaching the proposed new location. Considerable discussion then followed as to the construction of new highways, one to continue the present town road from the brick pavement up to the Holmes site, and another to be built along the tracks, between such site and the crossing, connecting such new locality with the state highway from the north, and thus making it possible to reach such new site from two directions and over public passageways. When this plan was proposed there was no objection raised by the respondent; indeed, there was substantial acquiescence by all the interested parties, except those residents of West Falls who are insistent upon the retention of

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the station as now located. Later, it developed that it was impossible to obtain rights of way for the north and south road along the railway, and that part of the plan was abandoned; but a written offer was filed with the Commission on behalf of those favoring the Holmes site, whereby a plot of two acres of land was tendered free to the railway company for the site of the new station and grounds, and they also bound themselves to construct a good road and a sidewalk from the brick pavement to such station, all at their own expense.

At this point the chief of the division of steam railroads of this Commission made a study of the whole situation with reference to all the questions bearing upon said station location, including the necessity and convenience of the traveling public, as well as the duties and responsibilities of the railway company, as a common carrier, to satisfy the same; a report thereof has been filed with the Commission, from which it appears that personal examination of both sites and the surrounding territory was made, and the probable requirements of the future, as well as the needs of the present, were given careful consideration.

This report concludes with the statement that the construction of the north and south highway does not seem necessary to give proper ingress and egress to and from the Holmes site, providing the new road is extended westerly from the brick highway to such site, and accepted by the town as a part of its system of highways; and in case that is done, a preference is expressed for the Holmes site. These views, except as to such north and south highway, coincide substantially with the opinion expressed by the Commissioner at the West Falls hearing, and which fairly reflected the attitude of the representatives of the respondent at that time; there can be no doubt as to the correctness of that conclusion, under the then existing circumstances, and proceeding upon the theory that the old site was then inadequate for station purposes both as to the necessities of the railroad company and the convenience of the traveling public. But a change has occurred with reference to the situation at the old site, and the respondent now claims that additional land has been procured and a new and improved lay-out has been planned, whereby all doubt con-

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cerning the adequacy of such site has been removed. If this is true, then this case must come to an end, and the Commission can not do otherwise than sustain the railroad company in its decision to utilize the old site for the station; because, the company itself has the first right to determine upon the location of its station, provided, always, that the requirements of section 50 of the Public Service Commissions Law are fairly complied with. And this is so, even though the Commission is satisfied, for sentimental or other reasons, that the station should go to another place. The provisions of this statute are absolutely controlling in this case, for it is there that the Commission finds its only authority to intervene in matters of this kind. "Convenience of the public" and "adequate service and facilities for the transportation of passengers and property" are the only subjects of inquiry delegated to the Commission; and although they are simple in statement, they are broad and comprehensive in their scope, and are of such paramount importance that all other questions must be considered as relating to non-essentials.

It, therefore, becomes necessary to carefully consider the additions and improvements made and contemplated by the railroad company at the old site, so that it may be intelligently determined whether or not the requirements of the Public Service Commissions Law have been fairly met and satisfied.

As has been stated, the respondent maintained a listening attitude at all the hearings in this case before June twenty-third, hoping, as was announced by its counsel, that this controversy might be adjusted by the people of West Falls along the line suggested by representatives of this Commission, notwithstanding the fact that a change in the location of the station, as proposed, was contrary to the judgment of all the officials of the railroad company, and particularly its engineering department, and would also require an additional expenditure of \$3,800 if the station went to the Holmes site, even though a large plot of land was generously donated to the company for station purposes. But the people of the neighborhood continued to be divided on the subject, and it seemed necessary that the company should take a decided stand in the matter, although its counsel and officials

had, by its answer and by other communications to the Commission, expressed a preference for the old site. This was particularly emphasized at the last hearing in this case, when proof was offered by the respondent showing that a considerable addition had been made, or was about to be made, to the land constituting the present site of the station and its lay-out. It appears from such proof that sufficient land has been purchased so that the new station, as planned, will be seventy-five feet farther from the crossing than the point where the old building stood, thus obviating the necessity for standing trains to occupy any part of the highway crossing; under the old arrangement there were no conveniences for teams to reach the station except by entering the grounds from the junction of the railroad and highway, while the present plans provide for the construction of a good roadway at least twenty-two feet wide, to leave the State highway at a point fifty feet south of the crossing, and, with a grade of only seventy-five hundredths of one per cent, skirt the embankment and wind around to the station platform, and to be protected by a standard highway guard-rail; heretofore there has been no way for foot passengers to reach the station except to climb the bank from the State highway or enter the station grounds from the crossing, but the company now proposes, in addition to such new roadway, to construct a cement walk six feet wide from the brick highway to the southerly end of the station platform; this walk will have a uniform grade of seventeen per cent, and may be laid at that grade throughout, or be divided into section of levels and steps; in front of the station it is intended to have a brick platform twelve feet wide and about three hundred feet long, and between the station building and the edge of the embankment there will be a space of more than thirty feet, the outer border of which will be protected by a substantial guard-rail; a large area about sixty feet square has been set apart for vehicles, and this is located next to the freight room, while the passenger waiting room, nineteen feet square, is in the northerly end of the building; the team track is across the highway, and objection was made at one of the hearings that in order to reach the team track it was necessary to go over private property; a change in this arrangement has been effected by the



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company, by purchasing eighteen-hundredths of an acre of land, and all necessary extensions to the driveway, leading to such track, will be constructed; the station itself will have a brick foundation and be of attractive design. All these facts conclusively appear from the testimony of witnesses on behalf of the respondent, and from exhibits, plans, maps and other documents which have been presented to the Commission and filed with the papers in this case.

The record is also replete with evidence showing the generosity and public-spiritedness of the proponents of the new site. In addition to the tender of an ample tract of land for the station and station lay-out, they are also willing to donate the land and pay all the cost of a good road and sidewalk from the brick pavement to the proposed new site, a distance of about 1,100 feet. Certain members of the town board appeared at the last hearing and announced that the town would undoubtedly accept and maintain such road; although it must be said that it does not appear affirmatively and definitely that either such proponents or the town board would be ready to expend such an amount of money as witnesses for the respondent testified would be necessary in order to build a road equal to the state highway, and do all the required grading and filling and construct the sidewalk.

But even if it should be made absolutely certain that the best kind of public passageways could be constructed and maintained from the brick pavement to the Holmes site, still the Commission would be without legal authority to compel the railroad company to move its station location, provided the facts above recited establish the adequacy and convenience of the old site for both the public and the company. While negotiations for the changes were going on, it was very proper to urge these considerations upon the respondent, in order to influence voluntary action on its part; in like manner it has been asserted that the location of the station on the Holmes site would tend to develop the territory in its immediate vicinity, and would give great satisfaction to many of the residents of the hamlet of West Falls, whose business or homes are nearer the Holmes site than they are to the old location. These and many other arguments have been earnestly made by those who are anxious for the change, supplemented by suggestion from

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representatives of the Commission, who have been actuated by a desire to adjust the matter amicably, and who have been impressed by the reasons thus advanced; while the advocates of the plan to keep the station where it is have not been idle, and perhaps they are entitled to the praise,—or blame,—for bringing about such an improved condition at the old site, that the railroad company is firmly convinced that the added facilities which have been definitely provided for, will satisfy every legal requirement for adequacy and convenience, not only for the present but for many years to come, having in mind the growth and development of West Falls, and the resultant increase in freight and passenger traffic at such station. On account of such enlargement of the station grounds and improvement in station facilities, and also by reason of the failure of the residents of West Falls to embrace the opportunity given them by the railroad company to settle this controversy among themselves, the respondent now demands that it be left free to exercise its legal prerogative to utilize the property which it now owns, and construct a station thereon, with the facilities and conveniences hereinabove set forth, subject only to the direction of the Commission as to such details of the same as may be deemed requisite to guarantee the convenience of the traveling public and the necessities of the railroad company.

Thus the Commission is confronted with a sterner duty than was involved in the negotiations which have been carried on for many months; for a decision must now be made in this case, and such decision should be uninfluenced by the mere desires or sentimental reasons which have been advanced by the parties; and even the personal predilections of the representatives of the Commission heretofore entertained and expressed should have no weight in reaching a result which must be based upon the evidence in this case, as it now exists, and be well within the authority of the Commission as defined by section 50 of the Public Service Commissions Law. This task has been rendered easy by reason of the proof made by the respondent at the last hearing in this case.

Before the proof was made, it appears that the old station site lacked many of the facilities and conveniences which every com-

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munity is fairly entitled to; and, therefore, the criticism of the same, coupled with the assurance that they could be easily supplied at the new site, was an argument possessing considerable force; and if that condition remained unchanged, perhaps a different conclusion would be reached in this case. But now, almost every important feature of this station site has been changed, enlarged and improved to such an extent that such criticism can no longer be justly made; and it must be admitted that, as regards the size of the station grounds, the public passageways, the team track extension, and other details relating to the station building and the lay-out of the grounds, all of which are shown by the exhibits in this case, if the railroad company will make such changes and improvements — and the company has agreed to do so — then this community will have a station which will satisfy every requirement of the law, and, at the same time, will guarantee adequate facilities for the railroad company for many years to come, and reasonable convenience for the traveling public.

This is the view expressed by the several experts who were called as witnesses at the last hearing, and who further stated that they believed that the facilities thus installed will meet all the demands of three times the present freight and passenger traffic at West Falls. We are in accord with this opinion, and must give the approval of the Commission to the action of the respondent in determining upon the old site for station purposes.

This action will probably be a disappointment to many of the residents of West Falls who have felt that their personal preferences ought to be considered of more importance than has been accorded to them; others may think that their generous offers in connection with the proposed new site have been brushed aside as of no consequence, while they believed the same to be of the utmost potentiality.

We have already pointed out that the Commission has given due consideration to these matters, but that they can not outweigh the specific requirements of the statute that the railroad company shall furnish adequate and convenient station facilities for itself and the traveling public.

It is quite apparent, therefore, that the company has fully met these legal requirements by providing for the changes, additions and improvements made and contemplated at the present station site, and above enumerated; this will assure reasonable security and convenience to the public, and will also afford adequate service and facilities for the transportation of passengers and property. Thus the full measure of public duty has been performed by the respondent, with reference to its station and station facilities, and it necessarily follows that the decision of the Commission should approve the determination of the railroad company to utilize, extend and improve its present station site according to the plans thereof filed with the Commission; and the application herein that the station be moved to the new site must be denied.

An order will be entered in accordance with these views, and the respondent be directed to proceed within a reasonable time with the construction of its station building, grounds and lay-out, and complete the same with all convenient speed.

All concur, except Commissioner Carr, not present.

In the Matter of the PROPOSED NEW PASSENGER FARES ON THE  
NEW YORK CENTRAL RAILROAD

Case No. 5345

(Public Service Commission, Second District, July 26, 1916)

Investigations under an act of 1914 as to the reasonableness of certain tariffs filed by the railroad — when the rates now under suspension can be considered herein.

On application to reopen this case, decided June 8, 1916, opinion No. 267, the railroad company sought an opportunity to offer evidence as to the value of its property used in intrastate passenger service. *Held*, that the burden under the statute being upon the carrier to justify the increase in rates, the case having proceeded upon the theory that the increase was justified because the intrastate revenue was less than the intrastate cost, the Commission having found that as to certain lines this was not the fact, and there being no suggestion that evidence

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of value was omitted because of accident, surprise, or ruling of the Commission, the case could not be reopened for the purpose of admitting such evidence.

That the refusal to reopen the present inquiry does not preclude the railroad company from filing such new tariffs as it may feel able to support by any proper evidence should another contest arise.

In this inquiry, which was under section 29 of the Public Service Commissions Law, as amended by chapter 240 of the Laws of 1914, and relates only to the reasonableness of tariffs showing increased fares filed by the company and suspended by the Commission, the Commission could not originally or on rehearing consider whether certain fares not increased by the suspended tariffs should properly be increased, assuming that the Commission has, in a proper proceeding, authority to authorize such increase.

By THE COMMISSION.— This is a proceeding under section 29 of the Public Service Commissions Law as amended by chapter 240 of the Laws of 1914, whereby the operation of certain passenger tariffs was suspended and an investigation entered upon as to their reasonableness. An order was made June 8, 1916, directing that the proposed tariffs as filed by or on behalf of the New York Central Railroad Company should be canceled on or before July first. The facts fully appear in the opinion of Carr, Commissioner, upon which the order was based. Opinion No. 267. The New York Central Railroad Company asked further time within which to determine whether it should accept such order or apply for a rehearing; and later, having filed the present application, the operating date of said order has been postponed and the suspension order continued until the 1st day of August, 1916.

The application is to reopen the proceedings in order that further evidence may be introduced. Grounds for the application are stated in three paragraphs:

*First*, that the petitioner having been of the opinion that the evidence which it could and did produce before the Commission would show that its revenue from intrastate passenger business in the State of New York was not sufficient to pay the cost of that service and that no return upon the value of its property used therein was received therefrom, the petitioner did not introduce evidence either as to its investment in said property or as to its

value, and that it desires on a reopening of the case to introduce such evidence.

*Second*, that in filing this revision of passenger rates it did not change the two cent rate in effect locally between Albany and Buffalo, and that, in view of the decision of the Court of Appeals in *Ulster & Delaware Railroad Company v. Public Service Commission*, 218 N. Y. 29, the petitioner desires to make such revision of its local tariffs between Albany and Buffalo as will bring them into harmony with its passenger rates in other parts of the State.

*Third*, that there should be harmony between the intrastate and interstate passenger rates, and that the determination of this case should be upon the fullest evidence and most thorough consideration of all of the elements of the problem. This third proposition is not specific and may be taken merely as a résumé or generalization of the two preceding.

At the beginning of the investigation, counsel for the petitioner made the following statement:

"We have not proposed, in the preparation of our case, and we do not propose in the presentation of it, to go into the question of valuation or of interest charges of any character. We simply intend to confine ourselves to the intrastate passenger revenues and the intrastate passenger expenses and the value of the service. To that end we will present our testimony, and we hope to be finished very shortly. Our reason for not going into the valuation question is, first, that it would be embarrassing at this time when the Interstate Commerce Commission is conducting a valuation of all the railroads of the country; and second, that it is unnecessary, as our intrastate passenger revenue is less than our intrastate costs, and of course it follows that if we are entitled to a reasonable return upon our investment and we do not obtain from the service enough of a return to pay the expenses, then it is unnecessary to go into the return on the investment."

The burden under the statute being upon the carrier to justify the increase in rates, the case proceeded upon the theory so presented. A great volume of evidence was taken upon that theory, with the result that the Commission found that the petitioner had

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failed to establish it in fact. It is not now suggested that evidence as to investment or value was omitted because of any accident, surprise, or ruling of the Commission, and were we to follow the rules of legal procedure it would clearly be improper to reopen the case for this particular reason. It would be unfortunate, however, to dispose of so important a matter upon any ground savoring of a technicality provided such disposition would disregard the substantial rights of the parties. On page 31 of the opinion of Commissioner Carr appears the following:

"From all the evidence which has been presented to us in this case, we are convinced that the New York Central has failed to justify any increase in its fares on its Hudson division between Albany and New York. As we have hereinbefore stated, the main line of the New York Central, even with the maximum fares ranging from two cents to two and seventeen-hundredths cents per mile, is earning a fair return, and the earnings on several of its other divisions are probably insufficient to pay a fair return on the passenger service on those divisions. We call attention to the fact here, that on some of those divisions, namely the Putnam and the Harlem, the existing tariffs are full of discriminations, and the tariffs which are now under suspension would probably remove many of these discriminations. In any event, it would seem advisable for the company to give prompt consideration to the criticism here made of the existing tariffs on these particular divisions, to the end that discriminations may be removed. It would probably necessitate some study on the part of the railroad officials to determine whether or not it will seek to advance the rates on any of the divisions which are now operated at a loss, and for that reason we think the better way to dispose of the matter is to require the cancellation of all the passenger tariffs filed by the New York Central which have been under suspension pending this investigation and an order will be entered to that effect."

It is therefore evident that the order directing the cancellation of the tariffs was not an adjudication that the petitioner might not properly increase its rates upon any part of its lines or in any particular amounts. The Commission having determined that the system of tariffs proposed was unreasonable in so far as it affected

the Hudson division, it thereupon considered that existing tariffs disclosed discriminations elsewhere, that the proposed tariffs were filed in pursuance of a general plan, and that the elimination of the proposed tariffs on the Hudson division would disarrange that plan. It was therefore left for the railroad company to make a new study of the problem and, if it saw fit, present a new system of tariffs. A refusal to reopen the present inquiry does not therefore preclude the railroad company from filing such new tariffs as it may feel able to support by any proper evidence if another contest should arise.

The second ground of the petition is the argument that the petitioner is no longer bound by chapter 76 of the Laws of 1853, limiting passenger rates for way passengers between Albany and Buffalo to two cents a mile, and petitioner relies on *People ex rel. Ulster & Delaware Railroad Company v. Public Service Commission*, 218 N. Y. 29. In the *Ulster and Delaware* case, the court had under consideration the so-called Mileage Book Law, and it held that notwithstanding the provisions of that law (Railroad Law, § 60) the Commission has power where it appears that the statutory rate of two cents a mile is insufficient, to permit an increase in the rate. Justice Cochrane, whose opinion, 171 Appellate Division, 607, was adopted by the Court of Appeals, referring to the limitation of two cents a mile under section 60, says: "Those limitations remained on the railroad, but not on the power of the Commission. \* \* \* My opinion is that section 60 of the Railroad Law establishes the maximum rate for mileage books in the absence of an order by the Commission. It represents the law on the subject so long as the Commission takes no action. But sections 49 and 33 of the Public Service Commissions Law authorized the Commission to make an investigation, and where it appears that the statutory rate of two cents per mile is insufficient, the Commission may by order increase the rate above that amount."

Assuming that the same reasoning applies to the act of 1853 above referred to, limiting fares for way passengers between Albany and Buffalo to two cents, no question of an increase of



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Public Service Commission, Second District

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that rate is presented or could be presented in the present case. This is an investigation under the act of 1914 as to the reasonableness of certain tariffs filed by the railroad. These tariffs do not affect way rates between Albany and Buffalo. The Commission in this proceeding can consider only the tariffs under suspension. Way rates between Albany and Buffalo remain at the statutory figure at least until the Commission in an appropriate proceeding authorizes a higher date. This is not such a proceeding. The petition to reopen the case must, therefore, be denied.

All concur except Emmet, Commissioner, who dissents; and Carr, Commissioner, who is absent.

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In the Matter of the Petition of the MAYOR AND COMMON COUNCIL OF THE CITY OF ROCHESTER, under Section 91 of the Railroad Law, for the Elimination of a Grade Crossing at Brown Street of the New York Central Railroad and the Buffalo, Rochester and Pittsburgh Railway Company and the Construction of a New Grade Crossing

Case No. 5005

(Public Service Commission, Second District, July 26, 1916)

**Elimination of certain grade crossing of the New York Central Railroad in the city of Rochester.**

The city of Rochester has petitioned for an order requiring the elimination of the grade crossings across the four tracks of the New York Central railroad and the two tracks of the Buffalo, Rochester and Pittsburgh railway on Brown street, on account of the safety of the public and the dangerous nature of such crossings. *Held*, that public safety requires the elimination of such crossings.

BY THE COMMISSION.—Brown street, an important thoroughfare in the city of Rochester, extending in a northeasterly and southwesterly direction, and forming one of the main outlets to the western part of the city of Rochester, crosses four tracks of the New York Central railroad and two tracks of the Buffalo, Rochester and Pittsburgh railway at grade. On account of the

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density of traffic on the street and the density and high speed of traffic on the railroads, together with the acute angle of intersection included between the railroad and street lines, these crossings embody many elements of danger.

The city of Rochester, through its mayor and common council, has petitioned this Commission to determine that public safety requires the elimination of said Brown Street crossings. Numerous conferences between representatives of the railroads and of the city have resulted in the preparation of a general plan satisfactory alike to the railroads and the city, said plan providing for the carrying of Brown street under the grades of the railroads.

Upon this petition the Commission held a hearing on July 20, 1916; Benjamin B. Cunningham, corporation counsel, and E. A. Fisher, consulting engineer, for the city of Rochester; Harris, Beach, Harris & Matson (by Daniel M. Beach), Rochester, N. Y., for the New York Central Railroad Company; and W. F. Pond, office engineer, Buffalo, Rochester and Pittsburgh Railway Company, appearing; at which proof of publication of notice of hearing and of personal service of notice of this hearing upon property owners in interest was made. At this hearing there was introduced in the evidence a plan marked "Applicants' Ex. No. 2," herein referred to as the general plan for the elimination agreed to between the railroads and the city.

There has been an understanding by the Commission that the city of Rochester is prepared to agree that the share of the State in the expense of this project shall be limited to \$100,000 (one-quarter of the total estimated cost of \$400,000), so that no part of the cost of the improvement, of whatsoever nature, in excess of \$100,000 shall in any manner attach to, be paid, or be payable by the State of New York.

There was no opposition at the hearing to the elimination of the crossings nor to the plan proposed. The Commission has accordingly determined that public safety requires the elimination of said crossing, and therefore

Ordered: 1. That the grade crossings of the New York Central railroad and the Buffalo, Rochester and Pittsburgh railway by Brown street, in the city of Rochester, shall be closed and discon-

## Public Service Commission, Second District

tinued, and that the traffic be carried under the grade of said railroads in undergrade crossings; that approaches to said undergrade crossings be constructed; that portions of certain streets now connecting into Brown street within the elimination area be re-graded and improved; that Tonawanda street be re-located and reconstructed upon lines forming an extension with those now in existence where said Tonawanda street now joins Saxton street, a street crossing the railroad about 1,050 feet westerly of Brown street; that the tracks of the New York Central railroad and of the Buffalo, Rochester and Pittsburgh railway be raised and partly re-located; and that sewers, walls, stairways, pavements, and other structures be provided, all as hereafter more fully described and specified.

2. In order to provide the desired overhead clearance in the subway and to obtain fall sufficient to secure a practicable grade in the proposed drainage system, the four existing tracks of the New York Central railroad shall be raised to conform to the following profile: Beginning at a point about 1,300 feet westerly of Brown street, and proceeding easterly, ascending at the rate of 0.133 per cent to a point about 300 feet east of Brown street; crossing Brown street about 2.97 feet above the existing track elevation; thence by 300 feet long vertical curve to join the existing track surface at about the westerly line of King street.

The two tracks of the Buffalo, Rochester and Pittsburg railway shall be raised about 1.14 feet at Brown street above their present elevation; the new track grade to descend thence easterly at the rate of about 1.55 per cent to about the westerly line of King street. From Brown street westerly the tracks shall be brought to a junction with the existing track surface by means of a level grade about 100 feet long, and a grade about 200 feet long descending westerly at the rate of approximately 1.75 per cent.

3. Beginning on the south side of the tracks at a point about 450 feet from the center line of the Buffalo, Rochester and Pittsburgh railway, the grade of Brown street shall be changed so as to pass under the grade of the railroads as follows: Descending 5 per cent a distance of about 410 feet; thence continuing to proceed northerly, ascending at the rate of 0.405 per cent across the tracks

of both railroads a distance of about 275 feet; thence continuing to ascend at the rate of 4 per cent on the north side of the New York Central railroad tracks a distance of about 190 feet to an intersection with the surface of Brown street as it exists at the present time.

The following additional streets on the south side of the Buffalo, Rochester and Pittsburgh railway tracks are to be re-graded to meet the new grade of Brown street:

(a) *Maple street (west of Brown street)*: This street to be re-graded, beginning at a point about 220 feet westerly of the center line of Brown street, descending thence at the uniform rate of 5 per cent to Brown street.

(b) *Jefferson street*: Beginning at a point about 330 feet from its intersection with Brown street, descending thence uniformly at the rate of 5 per cent to Brown street.

(c) *Maple street (east of Brown street)*: Beginning at a point about 285 feet from its intersection with the center line of Brown street, thence descending toward Brown street uniformly at the rate of 4 per cent.

(d) *Rossenbach Place*: Beginning at a point about 130 feet from the center line of Maple street (east of Brown street), descending thence toward Maple street uniformly at the rate of 10 per cent.

On the north side of the New York Central railroad, Wilder street is to be re-graded and its northerly alignment changed, the new grade descending from the intersection of Wilder, Romeyn, and Grape streets at the rate of about 5 per cent a distance of approximately 95 feet; thence at the rate of about 4.43 per cent a distance of about 140 feet.

Tonawanda street parallels the New York Central railroad on the north and is immediately adjacent to the railroad line. In connection with a previous improvement carried out by the New York Central Railroad Company in conjunction with the Buffalo, Rochester and Pittsburgh Railway Company and the city of Rochester at Saxton street, Tonawanda street was partly re-located, the center line of such re-located portion being approximately 95 feet from the center line of the New York Central railroad, its previous location having been approximately 50 feet from the

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same point. It is the intention of the city to ultimately extend Tonawanda street from Saxton street to Brown street upon the new lines thus established, and the plan for Brown street elimination provides for the approach along Tonawanda street on an extension of these lines thus established. This street, therefore, shall be re-located from a point at approximately the intersection of the westerly line of Grape street and the center line of new Tonawanda street as it exists in the vicinity of Saxton street, the grade of such re-located street to descend toward Brown street uniformly at the rate of 5 per cent.

On account of the revised grades of Wilder street, Brown street, and re-located Tonawanda street, the surface at their intersection must necessarily be warped in order to secure satisfactory drainage conditions and to permit the grades of the various streets to merge into each other in a manner consistent with public safety.

4. The subway on Brown street shall be constructed to a clear width of 60 feet measured at right angles to the masonry abutments, said 60 feet to be divided between a roadway 30 feet wide between curb lines, and two sidewalks: one on each side of said roadway, each 15 feet wide.

5. The bridges carrying the railroads in three spans (a roadway and two sidewalk spans) shall support solid floors, the intermediate supports being columns and piers, the former being located immediately inside the curb lines.

6. With the exception of Brown street, which is to be paved throughout the entire length of the improvement with a new Medina sandstone pavement, all streets embraced within the elimination area whose surfaces must be disturbed (except Rossenbach Place) as herein provided shall be paved with brick. A pavement similar to the existing pavement on Rossenbach Place shall be laid on that part of the roadway lying within the change of grade.

Concrete sidewalks 5 feet wide shall be built on the south and the new north lines of Wilder street, on both sides of Tonawanda street as re-located, on both sides of Maple street east and west of Brown street, on both sides of Jefferson street, and on Brown street except in the subway, where concrete sidewalks shall be built for the entire width of 15 feet from curbs to the abutments.

7. Drainage of the subway and its approaches shall be provided to the Erie canal, located to the east of Brown street. The most satisfactory location of the main sewer has not yet been determined, and its final location shall therefore be the subject of further study by the interested parties hereto and of future determination by this Commission.

The existing sewer in Brown street, and those in the various connecting streets if such now exist, shall if necessary be taken up and re-laid or new sewers provided; existing waterpipes and any other subsurface conduits where the same interfere with the projected grades on the streets whose surface must be disturbed shall be re-laid as the necessities of the case require. The final profiles of said sewers as they are to be re-laid, their dimensions, the location of manholes, catch-basins, etc., and all the work hereinbefore described as embraced within this elimination, shall be substantially in accordance with the general plan "Exhibit No. 2," heretofore referred to on file with this Commission, entitled: "N. Y. C. R. R., Buffalo and East Main Line, Syracuse Division, Elimination of Grade Crossing, Brown Street, 1.3 miles west of Rochester, Issue No. A, New York, July 19, 1916."

8. Retaining walls along all re-graded streets and stairways leading to private property shall if necessary be constructed, and at such places where walls are not required the sides of the excavation shall be left upon the natural slope of the earth.

9. In order to provide the required clearance on the bridges, the tracks of the New York Central railroad and the Buffalo, Rochester and Pittsburgh railway shall be so re-located as to provide the necessary spread between track centers at Brown street.

10. In accordance with the aforesaid understanding, the city of Rochester shall assume, pay, and discharge so much of the entire cost and expense of the construction and work herein authorized and provided for, including the cost of any lands, rights, or easements necessary or required for the purpose of carrying out the provisions of this order, and of any land or other damages whatsoever which may arise by virtue hereof, as shall exceed the sum of \$400,000, which last mentioned sum is to be paid by the railroad companies, the city of Rochester, and the State of New York,

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Public Service Commission, Second District

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respectively, in such proportions as are fixed by statute in such case made and provided: this order being granted upon the express condition that no financial liability or obligation whatsoever in excess of one-fourth of the sum of \$400,000 shall attach to or fall upon the State of New York on account of the acquisition of lands, rights, or easements necessary or required, the construction and work, or for any other incidental expenses herein authorized and provided for; and that no sum in excess of one-fourth of said sum of \$400,000 shall be payable out of any moneys which may have been or may be appropriated by the Legislature of the State of New York for the purpose either of the elimination of grade crossings or of the reconstruction of work at crossings either at grade or otherwise.

The acceptance of this order by the city of Rochester shall be deemed as an undertaking on its part to save the State of New York and this Commission harmless from all costs, expenses, claims, or demands whatsoever on account of this order and of any provisions thereof in excess of one-fourth of the sum of \$400,000, amounting to the sum of \$100,000, no interest to be added.

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In the Matter of the Petition of the CLIFF ELECTRICAL DISTRIBUTING COMPANY under Section 69 of the Public Service Commissions Law for Authority to Issue \$100,000 Common Capital Stock

Case No. 5402

(Public Service Commission, Second District, July 26, 1916)

First supplemental and amendatory order in relation to issue of capital stock.

By an order entered herein on February 24, 1916, the Cliff Electrical Distributing Company was authorized to issue \$100,000 par value of its capital stock for certain specified purposes. The present order modifies that made originally so as to authorize the use of the stock proceeds for the capital expenditures as reported.

BY THE COMMISSION.—All of the stock authorized by the original order to be used has been sold and by report dated July 20, 1916, it appears that expenditures have been made in some

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instances for more and others for less than the amounts authorized for such purposes in the aforesaid order and the company prays that the said order be modified as may be necessary to authorize the use of the stock proceeds for the actual expenditures as reported.

Now, therefore, Ordered, that ordering clause 2 of the order heretofore entered herein on the 24th day of February, 1916, is hereby amended by the substitution therefor of the following:

2. That said stock of the par value of \$100,000 so authorized or the proceeds thereof to the amount of \$100,000 shall be used solely and exclusively for the following purposes:

(a) For the construction of a transmission line to the plant of the Hooker Electrochemical Company in the city of Niagara Falls, including the installation of necessary conduit, etc., through the thoroughfares enumerated in the original petition herein as amended by supplemental petition dated July 20, 1916, as follows:

1. Bridge over Gill creek.....	\$300 00
2. 35 manholes (outside measurements 9 x 8 x 7) at \$150.....	5,250 00
3. 325 cubic yards of rock at \$4.....	1,300 00
4. 9,780.85 feet of 6-duct conduit.....	20,638 68
5. 974 feet of 4-duct conduit.....	1,830 51
6. 84 feet of 9-duct conduit.....	241 92
7. 32,535 feet 250,000 CM cable.....	35,016 65
8. Cost of installing above cable.....	2,500 47
	<hr/>
	\$67,078 23

(b) To enlarge the capacity of four alternators in the petitioner's substation No. 3 from 6,500 KVA to 8,000 KVA.....	33,136 82
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	\$100,215 05

Amount unprovided for.....	\$215 05
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in so far as the same may be applicable, provided:



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(1) That such stock or the proceeds thereof shall be applied on such new construction summarized in subdivision (a) hereof only in so far as the same is a real increase in the fixed capital of the petitioner and not a replacement of any part of such fixed capital or substitution for wasted capital or other loss properly chargeable to income in accordance with the definitions contained in the uniform system of accounts for electrical corporations adopted by this Commission.

(2) That there shall not be expended for any of such purposes a sum in excess of the amount set opposite such purpose.

(3) That there shall be no charges to fixed capital on account of services or engineering in connection with such construction except in so far as the same shall not be performed by the regular employees and officers of the company, or by such officers and employees who have been especially assigned to such construction work.

(4) That if there shall be required for any of the aforesaid purposes, subject to the limitations herein contained, a sum less than the amount set opposite thereto, no portion of said amount over the actual cost thereof so required shall be used for any purpose without the further order of this Commission.

(5) That the unit prices contained in the petition are not intended to be and must not be construed by the petitioner as having been determined upon by the Commission as the actual cost of property and work to be acquired and done and thus properly chargeable to fixed capital, but are intended and shall be construed only to be a present estimate of the probable cost of such property and work, the actual cost of which must be actual expenditures made as defined by the Commission's uniform system of accounts for electrical corporations.

Finally, it is determined and stated, that in the opinion of the Commission the use of the proceeds of the stock heretofore authorized and issued is reasonably required for the purposes specified in this order and that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

In the Matter of the Joint Petition of NORTH SHORE ELECTRIC LIGHT AND POWER COMPANY and PORT JEFFERSON ELECTRIC LIGHT COMPANY under Section 70 of the Public Service Commissions Law for Consent to the Transfer of the Franchises, Works, and System of the Last Named Company to the First Named Company; Which Petition Includes that of the North Shore Company under Section 69 of the Public Service Commissions Law for Authority to Issue \$20,000 Common Capital Stock and \$53,000 5 Per Cent First Mortgage Twenty-Five-Year Gold Bonds, and under Section 70 for Consent to Acquire \$28,000 of the Mortgage Bonds of the Port Jefferson Company; Also Petition of Edward A. Alexander, Attorney for the Executors of William Henry Blatch, Deceased, for Rehearing

Case No. 5562

(Public Service Commission, Second District, July 31, 1916)

The Commission is not bound to protect any owner who merely shows that he has an undetermined tort action for unliquidated damages.

The Commission should not, in authorizing the sale of the plants and franchises of a corporation subject to its jurisdiction, impound the purchase money or require a bond in order to secure demands against the vendor company not liens upon its property, unliquidated and not adjudicated to be valid, although an action may at the time be pending having for its object the enforcement of such demands.

The Commission cannot, merely because a defendant in a pending judicial proceeding is a public service corporation, grant a remedy provisional or ancillary to that proceeding.

Frank Weinstein as counsel for petitioner.

Howard C. Hopson, for the North Shore Electric Light and Power Company and Port Jefferson Electric Light Company.

E. E. Wheeler, Vice-president of the Port Jefferson Electric Light Company.

BY THE COMMISSION.—An order made by the Commission in this case June 6, 1914, authorized the Port Jefferson Electric Light Company to sell all of its property, rights, and franchises,

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Public Service Commission, Second District

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except cash, bills and accounts receivable, and a certain parcel of land in the village of Port Jefferson, subject to certain outstanding bonded indebtedness, to the North Shore Electric Light and Power Company, "provided that there shall be no other outstanding indebtedness on such property at the date of transfer," and subject to other conditions. The purchase price was the sum of \$37,000.

There has been filed on behalf of the executors of the last will and testament of William Henry Blatch, deceased, an application for a rehearing upon the ground that these executors have pending in the Supreme Court of the State of New York an action against the Port Jefferson Electric Light Company to recover damages stated at \$100,000 for the death of their testator, caused, as alleged, by the negligence and wrongful act of the Port Jefferson company, and that no provision is made in the Commission's order for the protection of the applicants or other unsecured creditors. The specific request is that some suitable provision should be inserted in the order protecting the rights of creditors having unliquidated claims against the Port Jefferson Electric Light Company, and especially the claim of the executors of William Henry Blatch, deceased. The Commission, doubting its authority in the premises, gave a hearing to the applicants, and upon the hearing the demand of the applicants was again stated "that a provision be inserted in the order of June 6th granting permission upon the condition that the Port Jefferson company retain the \$37,000 intact until our claim for damages is passed on by the courts; or, that the Port Jefferson company give a suitable bond for such amount which this Commission may deem reasonable, conditioned to pay any judgment which the executors of William Henry Blatch, deceased, may obtain against the Port Jefferson company."

The question is thus presented whether the Commission may, or, in the exercise of its discretion, should, on authorizing the sale of the plant and franchises of a corporation subject to its jurisdiction, impound the purchase money or require a bond in order to secure demands, not liens upon the property, unliquidated and not adjudicated to be valid, although an action is at the time pending having for its object the enforcement of such demands.

Appeal is made to the broad general provisions of the Public Service Commissions Law giving the Commission general supervision over electrical corporations. This supervision is granted for the purpose of compelling the performance by the corporation of public duties specified by law. The Public Service Commissions Law did not confer upon the Commission the power of a court of law or equity to adjudicate private rights between the corporation and others, and it must of course be conceded that this Commission can not take jurisdiction of the claim of the executors against the Port Jefferson Electric Light Company. That is a matter for the courts alone. The Code of Civil Procedure contains certain enactments for provisional remedies in aid of pending judicial proceedings. By section 604, an injunction may be had "where it appears by affidavit that the defendant during the pendency of the action threatens or is about to remove or to dispose of his property with intent to defraud the plaintiff." By sections 635 and 636, in an action for injury to person or property in consequence of negligence, fraud or other wrongful act, an attachment may be had upon affidavit that the defendant if a natural person or a domestic corporation "has assigned, disposed of or secreted or is about to assign, dispose of or secrete property with like intent" [to defraud his creditors]. It is elementary law in this State that these provisions are exclusive. Indeed, it was admitted on the hearing that an injunction could not be had unless the applicants could show fraud on the part of the corporation, "which we admit at the present time we can not do." "To be frank, we do not believe the equity court has jurisdiction." If the courts in aid and protection of their own jurisdiction are confined to specific statutory authority, the Commission certainly can not, because of the mere accident that the defendant in the action is a public service corporation, confer a provisional or ancillary remedy denied to the court having jurisdiction of the case.

It is said that the sale is illegal because it operates to divest the corporation of all its property without paying its obligations. If this is true, it must be because the sale operates as a fraud upon creditors. In that event the applicants would have a remedy in the appropriate forum.

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On the hearing, a brief was invited and counsel asked to direct this particularly to the status as a creditor of one holding an unliquidated claim. This is disposed of in the brief by the bland statement that there are legal authorities to support the applicants' contention, and if the Commission should express any doubt upon the subject, counsel asks permission to submit a few controlling authorities. The Commission expressed doubt on the hearing and asked that the brief be directed to this point. There is certainly no controlling authority requiring the Commission to protect, in the manner requested, anyone who merely shows that he has a tort action pending for unliquidated damages, undetermined and untried. Such a practice would permit any unscrupulous person, merely by serving a summons, to delay and perhaps defeat enterprises of the most desirable and most urgent character. The motion for rehearing must be denied.

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In the Matter of the Petition of ITHACA GAS AND ELECTRIC CORPORATION, under Section 68 of the Public Service Commissions Law, for Permission to Construct an Electric Plant and a Gas Plant, Including Poles, Wires, Conduits, Mains and Appurtenances for Furnishing and Transmitting Electricity and for Furnishing Gas, for Light, Heat or Power, to the Public in the Towns of Ithaca and Lansing and the Incorporated Village of Cayuga Heights, Tompkins County, and for Approval of the Exercise of Rights and Privileges under Franchises Therefor Received from the Municipalities

Case No. 5592

(Public Service Commission, Second District, July 31, 1916)

Proposed electric and gas plant in the towns of Ithaca and Lansing and the incorporated village of Cayuga Heights, Tompkins county.

The applicant, Ithaca Gas and Electric Corporation, is now furnishing gas and electricity to the public in the city of Ithaca. Cayuga Heights is an incorporated village just north of that city, and the town of Ithaca surrounds both the city and the village. The town of Lansing adjoins the town of Ithaca. The application herein is in the nature of seeking an extension of the applicant's Ithaca plant. Application granted for the furnishing of gas and electricity for light, heat or power in the towns and village above named.

Public Service Commission, Second District

BY THE COMMISSION.—The Ithaca Gas and Electric Corporation ask permission, under section 68 of the Public Service Commissions Law, to construct an electric plant and a gas plant in the towns of Ithaca and Lansing and the village of Cayuga Heights, Tompkins county, and the approval of franchises therefor. The applicant is now furnishing gas and electricity to the public in the city of Ithaca; the incorporated village of Cayuga Heights is immediately north of the city of Ithaca, the town of Ithaca surrounds both and the town of Lansing adjoins the town of Ithaca. The franchises are as follows:

“1. Resolution of the town board of the town of Ithaca, dated April 1, 1916, concurred in the same day by the town superintendent of highways, ‘to lay gas pipes through and beneath the surface of any of the highways, streets, avenues, lanes, public alleys and other public places in said town, for the purpose of conducting illuminating and fuel gas’ and ‘to erect and maintain in any of the streets, avenues, lanes, public alleys and other public places in said town, poles, lines of wires, insulators, transformer-arms and braces, and to suspend from the poles and wires to be erected, or that are now erected, electric lights for street lighting purposes, and to connect said lights and wires with any and all public and private buildings in said town for the purpose of lighting the same with electricity, and to transmit thereon, such electric current at all times as shall be necessary and proper for such street lighting and for such lighting of public and private buildings and also for the proper transmission of electricity and electrical current over said wires for the purposes of heat or power to be used in any of the public or private places;’

“2. Resolution of the town board of the town of Lansing, dated April 4, 1916, concurred in the same day by the town superintendent of highways, identical in terms with the preceding except as to the name of municipality;

“3. Resolution of the president and trustees of the village of Cayuga Heights, dated April 12, 1916, concurred in April 14, 1916, by the street commissioner, identical in terms with number 1, except as to name of municipality.”

At the hearing held, after due notice, in the city of Ithaca, July

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Public Service Commission, Second District

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22, 1916, Mr. C. T. Stagg appeared for the town of Ithaca and the village of Cayuga Heights, Mr. E. H. Bostwick for the petitioner and Mr. J. I. Mange, as president of the Ithaca Gas and Electric Corporation. There was no appearance in opposition to the application. The Ithaca Traction Corporation had filed a protest against the petition but it did not appear at the hearing and its president informed the sitting commissioner that he desired to withdraw the protest. It appeared that the applicant is already furnishing electricity in certain districts of the municipalities above named but heretofore without formal franchises therefor. It desires fully to legalize such operation and to provide for such extensions of its service as the needs of the public may demand. It is not the immediate purpose to furnish gas or electricity in the entire territory covered by the franchises especially in the town of Lansing, and it was stated on the hearing that the approval of such franchises was not to be taken to preclude the subsequent approval of other possible franchises for territory not covered by the applicant.

It is determined and stated, That the construction of said plants and the exercise of each of said franchises are necessary and convenient for the public service, and it is

Ordered: 1. That the permission and approval of the Commission be given to Ithaca Gas and Electric Corporation, to construct an electric plant and a gas plant, including poles, wires, conduits, mains and appurtenances for furnishing and transmitting electricity and for furnishing gas, for light, heat or power, to the public in the towns of Ithaca and Lansing and the incorporated village of Cayuga Heights, Tompkins county, N. Y., in accordance with the terms and provisions of the franchises aforesaid:

2. That the permission and approval of the Commission be given to said Ithaca Gas and Electric Corporation, to exercise the rights and privileges conferred by each of said franchises, subject, however, to all the terms and conditions thereof.

3. No poles, wires or other structures shall be placed upon, along or across any state or county highway without the consent of the State Commissioner of Highways.

In the Matter of the Petition of the EMPIRE GAS AND ELECTRIC COMPANY under Section 70 of the Public Service Commissions Law, and Subdivision 3, Section 61, Transportation Corporations Law, for Consent to Acquire the Franchises, Works and System of the Central New York Gas and Electric Company and Merge It under section 15 of the Stock Corporation Law

Case No. 4741

(Public Service Commission, Second District, July 31, 1916)

**Application for leave to merge two gas and electric companies.**

The petition herein was filed February 10, 1915, and on April 13, 1915, was amended and thereon the report of the division of capitalization was made September 1, 1915. The gas engineer and the electrical engineer of the Commission reported respectively October 15, 1915, and January 10, 1916. The final report of the division of capitalization was dated February 29, 1916, and a public hearing was held on the 26th of July, 1916. Application granted with the usual restrictions.

BY THE COMMISSION.—Now, therefore, upon the foregoing record, ordered as follows:

1. That the Empire Gas and Electric Company and Central New York Gas and Electric Company are hereby permitted to merge and such merger is approved, and consent is hereby given to the exercise by the former of all the rights, privileges and franchises of the Central New York Gas and Electric Company; and within thirty days after such merger shall have become effective the Empire Gas and Electric Company shall file with the Commission a verified report setting forth the exact date of such merger.

2. That the merger of the Empire Gas and Electric Company and Central New York Gas and Electric Company shall be recorded by the consolidation of like accounts as represented upon the books of the petitioners.

3. That the authority contained in this order is upon the express condition that the petitioner accepts and agrees to comply in good



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Public Service Commission, Second District

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faith with the provisions hereof and within thirty days from the service hereof the Empire Gas and Electric Company shall file with the Commission a satisfactory verified stipulation duly authorized by its board of directors accepting this order with all its terms and conditions, and such order shall be void and of no force or effect until such stipulation shall have been filed as required herein.

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In the Matter of Petition of ORANGE AND ROCKLAND ELECTRIC COMPANY, under Section 69 of the Public Service Commissions Law, for Authority to Issue \$37,000 in 5 Per Cent Twenty-Year Bonds Secured by its First and Refunding Mortgage; for Reimbursement

Case No. 5058

(Public Service Commission, Second District, July 31, 1916)

**Application by an electric company for permission to issue \$37,000 of bonds.**

The petition herein was filed July 7, 1915, and statement as to fixed capital expenditures during 1913 and 1914 was filed July 7, 1915. The reports of the capitalization division and of the electrical engineer were made under date, respectively, of November 12, 1915, and April 21, 1916. An amendatory and supplemental petition was filed June 7, 1916, and the final report thereon of the capitalization division was made June 30, 1916. Petition granted with the usual restrictions.

By THE COMMISSION.—Now, therefore, upon the foregoing record, ordered as follows:

1. That proposed journal entries Nos. 1 and 2 contained in the final report of the division of capitalization in this proceeding, dated June 30, 1916, which on July 11, 1916, was sent to the corporation, such entries being listed on pages 10 and 11 inclusive thereof, shall be entered upon the books of the Orange and Rockland Electric Company, and that within thirty days from the service of this order verified proof shall be submitted to the Commission that such entries have been made.

2. That the Orange and Rockland Electric Company is hereby authorized to issue \$37,000 face value of its 5 per cent twenty-

year first mortgage bonds under a certain indenture dated the 1st day of May, 1911, given to the Columbus Trust Company of the city of Newburgh, as trustee, to secure an authorized issue of the total face value of \$500,000 and to sell such bonds at not less than 90 per cent of their face value to realize proceeds of at least \$33,300; or, in the alternative, said company is authorized to issue \$33,000 par value of its 7 per cent cumulative preferred capital stock which shall be sold at not less than its par value to realize proceeds of at least \$33,000; provided that said company may issue such portions of said bonds or stock herein authorized as it desires but in no case shall it issue such securities which when sold shall produce proceeds of more than \$33,300.

3. That such securities authorized in ordering clause No. 2 herein or their proceeds not to exceed \$33,300 shall be used for the reimbursement of the treasury of the petitioner for moneys actually expended from income for capital purposes during the calendar years 1913 and 1914 not obtained from the issue of stocks, bonds, notes or other evidence of indebtedness of such corporation, \$32,982.04. Excess provided for, \$317.96.

4. That the Orange and Rockland Electric Company is hereby authorized to issue \$25,000 par value of its 7 per cent cumulative preferred stock which shall be sold at not less than the par value thereof to realize proceeds of at least \$25,000, which proceeds shall be used for estimated expenditures for additions to fixed capital covering the purchase and installation of meters, transformers and other equipment and the necessary extensions to its lines during the calendar years 1916 and 1917, or for any proper fixed capital expenditures which the plans of the petitioner may make necessary, in so far as the same may be applicable; provided,

(1) That such stock or the proceeds thereof shall be applied on such new construction only in so far as the same is a real increase in the fixed capital of the petitioner and not a replacement of any part of such fixed capital or substitution for wasted capital or other loss properly chargeable to income in accordance with the definitions contained in the uniform system of accounts for electrical corporations adopted by this Commission.

(2) That there shall be no charges to fixed capital on account of

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Public Service Commission, Second District

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engineering services in connection with such construction unless such engineering services shall have been rendered either by other than the regular officers and employees of the corporation, or, in a proper case where such services may have been rendered by certain of such officers or employees, under an express assignment to such construction or improvement work.

(3) That the proceeds realized from the sale of stock herein authorized until used for such construction, shall be either deposited to the credit of the company in a special bank account or otherwise kept separately. The purpose and intent of this provision is to require the segregation of stock proceeds from the company's other cash so that a trial balance of the company's accounts at any time will show the extent to which its balance of cash is contracted for for new construction enumerated herein for which the proceeds of stock are authorized.

5. That if such securities herein authorized shall be sold at such a price as will enable the company to realize net proceeds of more than \$58,300 no portion of the proceeds of such sale in excess of \$58,300 shall be used for any purpose without an express order of the Commission.

6. That none of the bonds herein authorized shall be hypothecated or pledged as collateral by the Orange and Rockland Electric Company unless any such pledge or hypothecation shall have been expressly approved and authorized by this Commission.

7. That the Orange and Rockland Electric Company shall for each six months' period ending December thirty-first and June thirtieth file not more than thirty days from the end of such period a verified report showing:

(a) What securities have been sold, exchanged or otherwise disposed of during such period in accordance with the authority contained herein and the date of such sale or disposition.

(b) To whom such securities were sold.

(c) What proceeds were realized from such sale.

(d) Any other terms and conditions of such sale.

(e) With respect to ordering clause No. 4 herein there shall be shown,— (1) In detail the amount expended during such period of the proceeds of the stock herein authorized, and the account

Public Service Commission, Second District

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or accounts under the uniform system of accounts for electrical corporations to which the expenditures for such purposes have been charged, giving all details of any credits to fixed capital in connection with such expenditures.

(2) A summary by projects of the expenditures for such purpose during the period covered by the report.

(3) A summary showing the distribution by accounts provided in the uniform system of accounts of the expenditures during such period.

(f) The amount remaining unexpended of the proceeds of securities sold to be used for new construction authorized herein, which amount shall be the balance at that date in the special deposit which is to be established in accordance with the requirements of subdivision (3) of ordering clause No. 4 of this order.

In reporting under sections (2) and (3) of subdivisions (e) of this clause there shall be further shown the expenditures of the proceeds of the securities herein authorized to the beginning of the period reported upon and a total showing such expenditures to the end of the period, together with a statement of the balances in the fixed capital accounts as of the beginning and ending of such period.

Such reports shall continue to be filed until all of said securities shall have been sold or disposed of and the proceeds expended in accordance with the authority contained herein, and if during any period no securities were sold or disposed of or proceeds expended, the report shall set forth such fact.

8. That the authority contained in this order to issue securities is upon the express condition that the petitioner accepts and agrees to comply in good faith with the provisions hereof and before any securities are issued pursuant hereto and within thirty days of the service hereof, the said company shall file with this Commission a satisfactory verified stipulation duly authorized by its board of directors accepting this order with all its terms and conditions, and such order shall be void and of no force or effect until such stipulation shall have been filed as required herein.

9. It is nevertheless expressly provided that in all respects other than as directed in ordering clause No. 1 hereof, this order shall not be effective, and particularly that no securities shall be issued

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or sold hereunder by the applicant, nor shall the issue or sale of any such securities be deemed to have been approved and authorized by this Commission unless and until compliance with the requirements of ordering clause No. 1 of this order shall have been made, reported to and approved as sufficient by this Commission.

Finally, it is determined and stated, That in the opinion of the Commission the money to be procured by the issue of said securities herein authorized is reasonably required for the purposes specified in this order and that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

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In the Matter of the Petition of CARTHAGE AND COPENHAGEN RAILROAD COMPANY, under Section 55 of the Public Service Commissions Law, for Authority to Issue Capital Stock and Ratification of the Issuance of Stock Heretofore Issued

Case No. 5114

(Public Service Commission, Second District, July 31, 1916)

**Application by a railroad company for permission to issue \$8,400 of its common capital stock.**

The petition herein was filed August 3, 1915, and was amended under date of December 20, 1915. The affidavit of the accounting officer was filed January 12, 1916, and the report of the division of capitalization was made July 25, 1916. A hearing was held July 25, 1916. Application granted with the usual restrictions.

BY THE COMMISSION.—Now, therefore, upon the foregoing record, ordered as follows:

1. That the issuance and sale at par by the Carthage and Copenhagen Railroad Company of its common capital stock having a par value of \$14,300, between the dates of August 19, 1907, and April 30, 1913, not heretofore authorized by this Commission and its use of the proceeds thereof for capital purposes are hereby ratified and approved.

2. That the Carthage and Copenhagen Railroad Company is hereby authorized to issue \$8,400 par value of its common capital

Public Service Commission, Second District

stock to be sold at a price not less than the par value thereof to yield proceeds of \$8,400.

3. That said capital stock of the par value of \$8,400 so authorized or the proceeds thereof to the amount of \$8,400 shall be used solely and exclusively for the following purposes:

(a) For the payment of outstanding unfunded debt at June 30, 1915, to the extent of .....		\$2,920 52
(b) For the purchase of equipment, viz.:		
1 second-hand locomotive .....	4,000 00	
1 second-hand coach .....	1,500 00	
		<u>\$8,420 52</u>
Amount unprovided for .....		<u><u>\$20 52</u></u>

in so far as the same may be applicable; provided:

(1) That if there shall be required for the aforesaid purposes subject to the limitations herein contained, a sum less than an amount equal to the par value of the stock herein authorized, no portion of the proceeds of the stock herein authorized over the actual proceeds thereof so required shall be used for any purpose without the further order of this Commission.

(2) That the proceeds realized from the sale of stock herein authorized, until used for the authorized purposes, shall be either deposited to the credit of the company in a special bank account or otherwise kept separately. The purpose and intent of this provision is to require the segregation of stock proceeds from the company's other cash so that a trial balance of the company's accounts at any time will show the extent to which its balance of cash is contracted for for the purposes enumerated herein for which the proceeds of stock are authorized.

4. That if the said stock of a total par value of \$8,400 herein authorized shall be sold at such price as will enable the company to realize net proceeds of more than \$8,400, no portion of the

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Public Service Commission, Second District

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proceeds of such sale in excess of the last aforesaid sum shall be used for any purpose without the further order of the Commission.

5. That the Carthage and Copenhagen Railroad Company shall for each six months' period ending December thirty-first and June thirtieth, file not more than thirty days from the end of such period a verified report showing:

(a) What stock has been sold or otherwise disposed of during such period in accordance with the authority contained herein and the date of such sale or disposition.

(b) To whom such stock was sold.

(c) What proceeds were realized from such sale.

(d) Any other terms and conditions of such sale.

(e) In detail the amount expended for each of the purposes specified herein during such period of the proceeds of the stock herein authorized, and such report shall show for each of said purposes to what account or accounts under the classification of general balance sheet accounts and classification of investment in road and equipment for steam roads the expenditures for such purposes have been charged.

(f) A summary of the expenditures for each of such purposes during the period covered by the report.

(g) The amount remaining unexpended of the proceeds of stock sold or to be used for the purposes authorized herein, which amount shall be the balance at that date in the special deposit which is to be established in accordance with the requirements of subdivision (2) of ordering clause No. 3 of this order.

In reporting under subdivision (e) of this clause there shall be further shown the expenditures of the proceeds of the stock herein authorized to the beginning of the period reported upon and a total showing such expenditures to the end of the period, together with a statement of the balances in the road and equipment accounts as of the beginning and ending of such period.

Such reports shall continue to be filed until all of said stock shall have been sold or disposed of and the proceeds expended in accordance with the authority contained herein, and if during any period no stock was sold or disposed of or proceeds expended, the report shall set forth such fact.

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Public Service Commission, Second District

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6. That the company shall within thirty days of the service of this order advise the Commission whether or not it accepts the same with all its terms and conditions.

Finally, it is determined and stated, That in the opinion of the Commission the money procured and to be procured by the issue of said securities herein authorized was, and is, reasonably required for the purposes for which they were, or are to be used, and that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

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In the Matter of the Complaint of MARK H. ELLISON of New York City against THE NEW YORK TELEPHONE COMPANY, as to Charge for Over Five Minutes' Use of Telephone by Subscribers Who Contract for a Certain Number of Calls

Case No. 5552

(Public Service Commission, Second District, August 1, 1916)

Complaint against New York Telephone Company as to charge for over five minutes' use of telephone by certain subscribers.

Mark H. Ellison asks herein for an order restraining the telephone company from charging as an additional message each period of five minutes' continuous use on a local call after the first five minutes' period has elapsed.

By THE COMMISSION.—The complainant in this case seeks an order restraining the New York Telephone Company from making any additional charge for overtime on local messages, that is, charging as an additional message each period of five minutes' continuous use of the service on a local call after the first five minute period has elapsed.

A hearing was held at New York on June 27, 1916, and from the statements of complainant and respondent it was developed that there was no dispute as to the material facts in the case and that therefore a determination of the issue must be based upon the judgment of the Commission as to whether in view of the law



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Public Service Commission, Second District

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and the past practice of the respondent its present practice is justified.

This practice the respondent shows has been in force without material change since 1903. The method of ascertaining the overtime charges is through instructions to operators to note all apparent cases where the original five minute period of a conversation has elapsed and then record the time on the ticker, afterward recording also the time the conversation is finished. The operator then registers one call and hands the ticket to a supervising operator who computes the number of five minute periods as shown by the timing record, and registers against the calling subscriber one message for each five minute period less one.

The objections to this method are found, *first*, in the fact that all messages are not timed and that consequently not all cases of overtime are observed and charged for; *second*, that there must always be some elapsed time unrecorded; in both respects the method is inaccurate, although in both respects the inaccuracies are in favor of the public.

The respondent shows that of 9,690 local calls observed in Manhattan central offices 732 calls continued beyond the five minute period and that of the latter 7 calls were noted by the operators and charged for. This means that only  $7\frac{1}{2}$  per cent of the total number of calls observed in this particular test show overtime periods. Assuming that this test fairly represents the situation with regard to the measured service rendered in the city of New York as a whole, the company contends that to attempt to time all local messages from their inception to their finish would constitute an unreasonable burden and expense entirely out of proportion to the benefits that could accrue either to the company or to the public. The company further contends that for the measured service there must be a definite unit of measure.

The Commission has sufficient technical knowledge of telephone operations in general and of measured rate service in particular to fully appreciate the great burden and cost that would accompany the timing of every one of the millions of local messages that are handled annually in New York city under the measured service system. The necessity for a definite unit of measure for measured

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Public Service Commission, Second District

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rate service is too nearly axomatic to need discussion. Therefore, the Commission must accept both of the above contentions.

The respondent shows by its exhibits "A" and "C" that while the total routine periods charged for in Manhattan as a whole amount to .13 of 1 per cent of the total local messages billed against all Manhattan subscribers, it has to deal with cases where subscribers hold the wire for over an hour at a time. Such overtime use is clearly an abuse that deserves to be penalized. Such cases, as well as those of only one or two overtime periods, very naturally account for some of the not infrequent complaints of "busy wire," when it would be hard to convince the subscriber that the busy wire report was not false.

In the case of the complainant the company shows that from January 25, 1916, to May 28, 1916, he was charged for overtime on twenty-eight calls. One of these, according to the respondent's records, extended for an hour and twenty-three minutes and two others for over an hour.

The possible minor discrepancies that may arise through the inaccuracies in the method of observing and charging for overtime calls now followed by respondent cannot in the present development of the telephone business be held to be of such grave consequence as to constitute illegal discrimination or to warrant the issuance of an order requiring the accurate timing of each and every local message. No alternative or improvement to the present practice of the respondent in this matter has been advanced, neither has there been any intimation that the five minute period as a unit of measure for local measured service is unreasonable; it is therefore .

Ordered, That this complaint be and the same hereby is dismissed and the case closed on the records of the Commission.

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Public Service Commission, Second District

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In the Matter of the Complaint of the HIGH HILL BEACH  
IMPROVEMENT ASSOCIATION, Nassau County, against NEW  
YORK TELEPHONE COMPANY, Asking for Telephone Service  
During the Summer

Case No. 5548 .

(Public Service Commission, Second District, August 8, 1916)

**New York Telephone Company directed to construct a telephone line to High Hill Beach.**

Under the circumstances described in the opinion, it was held that telephone service should be installed at High Hill Beach, Nassau county, leaving the question of how a resulting loss, if any, upon the investment should be met for subsequent adjustment in case it should arise.

Owen W. Bowen, for complainant.

George R. Grant, for respondent.

EMMET, Commissioner.— This case presents an interesting and unusual situation, which so far as we know is without any parallel in New York State. High Hill Beach, a summer colony on Long Island within easy distance of New York city, comprising upward of one hundred and twenty-five bungalows owned by a substantial class of people, most of whom are telephone subscribers at their permanent residences and business places in New York, is and always has been entirely without commercial telegraph or telephone facilities of any sort. The New York Telephone Company has never felt inclined to extend its wires to the Beach on account of the comparatively high cost of construction and maintenance that would be involved in the operation. The Beach is distant about four miles, as the crow flies, from the main portion of Long Island, but about twice that distance by the winding channel that must be followed by boats approaching the Beach. It is served by three ferries from the mainland. There are in this community some six hundred summer residents, and a transient population on Sundays and holidays of from twelve hundred and fifteen hun-

## Public Service Commission, Second District

dred people. It has a post-office, a general store, a hotel, and it is only thirty miles, air line distance, from Manhattan Island.

No obstacle except an unlikelihood of resulting profits stands in the way of the Telephone company's establishing its service at High Hill Beach. Bringing the wires over from the main portion of the Island according to plans which have already been decided upon in case the work ever has to be done will, in the opinion of the company's engineers, involve a construction expense of about \$7,500, with carrying charges thereafter amounting possibly to as much as \$1,500 per annum. These estimates are probably fairly liberal. The construction estimate was based, as we understand it, upon the possibility that the work might have to be undertaken immediately and hurried through. If that should prove not to be the case — if in completing the work advantage could be taken of seasonable conditions — it has been suggested that certain substantial economies in the estimated construction cost might easily be effected.

In refusing, heretofore, to grant the request of these petitioners for telephone service, the Telephone company has been acting on the theory that if its wires were brought to the Beach, one public telephone station would probably be found to answer all the requirements of the neighborhood, and that therefore no general installation of private telephones in the cottages would take place. They have been influenced also, of course, by the fact that High Hill Beach is only a summer colony and not a place of permanent residence. They have concluded, from these circumstances, that their revenue from outgoing messages over a High Hill Beach extension would be small, probably not exceeding \$200 per annum. This would be an insignificant return upon the estimated cost of the extension and the high carrying charges.

It has seemed to the Commission, however, after considering the case quite carefully from every point of view, that a community as large as the one at High Hill Beach, even though it be but a summer colony — situated so near New York, and inhabited for several months of each year by people intimately connected by social and business ties with the city, and going constantly between the two places — is, under existing conditions in New

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Public Service Commission, Second District

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York state, entitled to telephone facilities even if these should not prove to be immediately self-supporting. It seems to us that the granting of relief in an exceptional situation of this kind is one of the public duties which a great and prosperous utility corporation like the New York Telephone Company has to hold itself ready occasionally to perform. With the general policy followed by the New York Telephone Company in regard to the extension of its lines into remote localities when it is often in the highest degree conjectural whether adequate profits will result, we have no fault whatsoever to find. The company has, in the main, done its duty to the public admirably in this matter of bringing telephone conveniences within the reach of practically everybody. Where some isolated householder in a remote country district, whose use of the telephone must under any circumstances be slight, demands telephone facilities involving a large original construction outlay, we have never thought it unreasonable that some guarantee or agreement should be asked for; either establishing a minimum amount which shall be paid monthly or annually for the service, whether used or not; or apportioning the cost of construction, in some equitable manner, between the company and the subscriber. This policy is really as much in the interest of the telephone users generally as it is in the interest of the telephone company, and we are far from intending, by our decision in this case, to suggest that the Commission's attitude toward this general question of unprofitable telephone extensions has in anywise changed. The case now before us seems, as we have said, to be *sui generis* — one which can be disposed of without the risk of establishing any dangerous precedent. As a matter of fact, we do not believe — the company's estimates to the contrary notwithstanding — that a High Hill Beach extension would long remain unprofitable. There is every reason to suppose that the installation of private telephones will proceed apace at High Hill Beach, as it has everywhere else, once it has become a possibility. Furthermore, the establishment of a telephone system at the Beach must inevitably cause a considerable amount of business that will be profitable to the Telephone company, to originate elsewhere — business which may not appear on the company's books to the credit of

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Public Service Commission, Second District

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the High Hill Beach system at all, but which none the less would never have originated if such a plant had not been in existence. If a slight resulting loss on the investment *should* ensue, the question of how this loss ought to be met — whether by the public generally or by the company out of its abundant profits elsewhere — will not be a very difficult one to handle, and may be reserved for subsequent adjustment in case it should arise. The order of the Commission is, therefore, that the New York Telephone Company shall proceed with the construction of a telephone line to High Hill Beach, and complete the same on or before June 1, 1917.

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In the Matter of the Petition of THE DEPOSIT ELECTRIC COMPANY, under Section 68 of the Public Service Commissions Law, for Permission to Construct in the Town of Tompkins, Delaware County, an Electric Plant Including Poles, Wires, Conduits and Appurtenances for Transmitting and Furnishing to the Public Electricity for Light, Heat or Power; and for Approval of the Exercise of Rights and Privileges under a Franchise Therefor Received from Said Town

Case No. 5638

(Public Service Commission, Second District, August 8, 1916)

**Application of an electric company for leave to extend its plant.**

The Deposit Electric Company of Deposit, N. Y., made application for the approval of a local franchise granted by the town of Tompkins, Delaware county, for the installation of a plant for the supplying of electricity for light, heat or power. Application granted with the usual restrictions.

By THE COMMISSION.— The Deposit Electric Company made application to this Commission on July 7, 1916, for permission to construct an electric plant in the town of Tompkins, Delaware county, and to exercise a franchise granted by the municipal authorities of said town. Proof of publication of notice of said

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Public Service Commission, Second District

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application was duly filed with the Commission on July 26, 1916. The corporation is now operating in the incorporated villages of Deposit and Hancock, in the town of Deposit and in the hamlets of Stilesville and Oquaga Lake in the town of Sanford. There is no other corporation supplying electrical energy for lighting, heating and power purposes in the town of Tompkins. This Commission having determined that the construction of such electric plant and the exercise of the rights and privileges set forth in the franchises granted by the municipal authorities of the town of Tompkins on June 6, 1916, are necessary and convenient for the public service, it is

Ordered, 1. That pursuant to the provisions of section 68 of the Public Service Commissions Law, the permission and approval of this Commission be and they hereby are given to the Deposit Electric Company to construct, maintain and operate an electric plant with transmission and distribution lines in the town of Tompkins, Delaware county, New York, and to exercise all the rights and privileges set forth in the franchise granted to it by the authorities of said town on June 6, 1916.

2. That this order is not intended to and shall not be construed to authorize any construction work in or upon any state or county highway unless and until the consent to and approval of such construction work shall have first been duly given by the State Commissioner of Highways.

In the Matter of the Petition of BROOKLYN COOPERAGE COMPANY, under Section 68 of the Public Service Commissions Law, for Permission to Construct Poles, Wires and Appurtenances for Furnishing the Public with Electricity for Light, Heat or Power in the Town of Salisbury, Herkimer County, and for Approval of the Exercise of Franchises Therefor Received from the Town

Case No. 5224

(Public Service Commission, Second District, August 8, 1916)

A manufacturing corporation organized under chapter 40 of the Laws of 1848 has no authority to do an electric lighting business unless that specific power is given under its charter.

Application by the Brooklyn Cooperage Company for permission to construct an electric plant in the town of Salisbury, Herkimer county, and to exercise a franchise granted by the local authorities on September 28, 1915. The applicant is a manufacturing corporation and the Attorney-General has held an informal opinion that such a corporation organized under the same law (chapter 40, Laws of 1848) as the applicant herein is without power to carry on an electric lighting business except as provided under its charter. Under the circumstances it is, therefore, necessary for the Commission to deny the application in this case. Application denied.

BY THE COMMISSION.—The Brooklyn Cooperage Company made application to this Commission on September 30, 1915, for permission to construct an electric plant in the town of Salisbury, Herkimer county, and to exercise a franchise granted by the local authorities of said town on September 28, 1915. The Cooperage Company is a manufacturing corporation organized under chapter 40 of the Laws of 1848 for the purpose of manufacturing and selling barrels and everything incidental thereto. There is no authority given in the charter to carry on an electric lighting and power business. The Attorney-General of the State of New York has recently made a decision to the effect that a manufacturing corporation organized under the aforesaid law of 1848 is without



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Public Service Commission, Second District

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power to carry on an electric lighting business unless it has that specific power under its charter. It is therefore apparent that the Commission cannot properly authorize a corporation to exercise a franchise for the purpose of carrying on a business not covered by its charter. Under the circumstances it is necessary for the Commission to deny the application in this case and it is, therefore,

Ordered, That the application of the Brooklyn Cooperage Company for permission to exercise a franchise to sell and distribute electricity for lighting, heating and power purposes in the town of Salisbury, Herkimer county, N. Y., under and pursuant to a franchise granted by the municipal authorities of said town be and the same hereby is denied.

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Petition of GOWANDA LIGHT AND POWER CORPORATION, under Section 68 of the Public Service Commissions Law, for Permission to Construct in the Town of Perrysburg, Cattaraugus County, an Electric Plant, Including Poles, Wires, Conduits and Appurtenances for Transmitting and Furnishing to the Public Electricity for Light, Heat or Power; and for Approval of Franchises Therefor Received from the Town Board and Superintendent of Highways

Case No. 5530

(Public Service Commission, Second District, August 16, 1916)

Petition by the Gowanda Light and Power Corporation to construct an electric plant in the town of Perrysburg, Cattaraugus county.

The company known as the Gowanda Light and Power Corporation has filed with the Commission a petition under section 68 of the Public Service Commissions Law, for permission to construct in the town of Perrysburg, Cattaraugus county, an electric plant for transmitting and furnishing to the public electricity for heat, light or power, and for approval of local franchises given for that purpose. The Silver Creek

Public Service Commission, Second District

Electric Company opposed this application but subsequently entered into a stipulation with the applicant that the latter would confine its line to the territory of the town of Perrysburg. Permission granted.

BY THE COMMISSION.—A petition, under section 68 of the Public Service Commissions Law, having been filed with this Commission by Gowanda Light and Power Corporation for permission to construct in the town of Perrysburg, Cattaraugus county, an electric plant, including poles, wires, conduits and appurtenances for transmitting and furnishing to the public electricity for light, heat or power, and for approval of the exercise of rights and privileges under franchises therefor received from the town; and public notice of the pendency of said petition having been published in newspapers in the locality; and public hearings on said petition, after due notice, having been held in the city of Buffalo; George E. Spring and George A. Larkin appearing for the petitioner; Strebel, Cory, Tubbs & Beals appearing for the Silver Creek Electric Company (which has filed a similar petition for said town, case No. 5461, determined this date) in opposition; and Harry D. Sanders appearing for the city of Buffalo; and a stipulation made July 22, 1916, between this petitioner and Silver Creek Electric Company having been filed with this Commission by which it appears that said Silver Creek company withdraws its opposition to the granting of this petition on condition that said Gowanda company shall (if this petition is granted — in such form as it hereinafter is) confine its electric lines to the territory of the town of Perrysburg hereinafter described; and this Commission hereby determining from the papers and hearings that the construction and exercise of franchises hereinafter permitted and approved are necessary and convenient for the public service, it is ordered:

1. That this Commission, under section 68 of the Public Service Commissions Law, hereby permits and approves construction by Gowanda Light and Power Corporation, in that portion of the town of Perrysburg, Cattaraugus county, which lies easterly of an imaginary line drawn from the north boundary of said town to the south boundary of said town through the westerly line of

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the incorporated village of Perrysburg, of an electric plant, including poles, wires, conduits and appurtenances for transmitting and furnishing to the public electricity for light, heat or power, and hereby permits and approves the exercise by Gowanda Light and Power Corporation of rights and privileges under two franchises to use the public streets, highways and public places of that portion of said town of Perrysburg in this paragraph before described, and not in other portions of said town notwithstanding the franchises cover the entire town, for constructing therein poles, wires, conduits and appurtenances for transmitting and furnishing to the public electricity for light, heat or power received by said Gowanda Light and Power Corporation one from the town board and one from the superintendent of highways of the said town of Perrysburg, November 1, 1915, copies of which franchises certified by D. E. Allen, clerk of said town, to be true copies are filed with this Commission with the papers in this case.

2. That this order is not intended to and shall not be construed to authorize any construction work in or upon any state or county highway unless and until consent to and approval of such construction work shall have first been duly given by the State Commission of Highways.

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In the Matter of the Petition of BINGHAMTON LIGHT, HEAT AND POWER COMPANY, under Section 69 of the Public Service Commissions Law, for Authority to Issue \$258,000 in First Refunding Mortgage 5 Per Cent Thirty Year Gold Bonds under an Existing Mortgage and \$95,100 of 6 Per Cent Cumulative Preferred Stock

Case No. 5635

(Public Service Commission, Second District, August 16, 1916)

**Application by the Binghamton Light, Heat and Power Company for permission to issue \$258,000 in 5 per cent first refunding mortgage gold bonds.**

The petition herein was filed July 14, 1916, and on August 10, 1916, the report of the electrical engineer was made. On August 14, 1916, the

Public Service Commission, Second District

division of capitalization filed its report on such application. The applicant company has given to the Guarantee Trust Company of New York, as trustee, a mortgage upon its property and the bonds now sought to be disposed of are based upon that mortgage. Permission granted for the sale of \$158,000 of 5 per cent thirty-year first refunding and improvement mortgage gold bonds out of a total face value of \$258,000 and the remaining \$100,000 shall be sold for not less than 88 per cent of the face value and accrued interest.

BY THE COMMISSION.— Ordered as follows:

1. That the Binghamton Light, Heat and Power Company is hereby authorized to issue \$258,000 face value of its 5 per cent thirty year first refunding and improvement mortgage gold bonds under a certain indenture dated the 1st day of February, 1916, given to the Guaranty Trust Company of New York, as trustee.

2. That of the said bonds of the total face value of \$258,000, \$158,000 face value thereof shall be sold for not less than 88½ per cent of their face value and accrued interest to give net proceeds of at least ..... \$139,830  
and the remaining \$100,000 face value of bonds shall  
be sold for not less than 88 per cent of their face  
value and accrued interest to give net proceedse of  
at least ..... 88,000

\$227,830

3. That the Binghamton Light, Heat and Power Company is hereby authorized to issue \$95,100 par value of its 6 per cent cumulative preferred stock, which shall be sold at a price not less than the par value thereof to give net proceeds of at least \$95,100.

4. That said securities of the total par and face value of \$353,100 or the proceeds thereof to the amount of \$322,930 shall be used solely and exclusively for proposed expenditures for additions and betterments during the calendar year 1916, as detailed and described in Exhibits A and A-1 attached to the petition herein as follows:

## Public Service Commission, Second District

## (A) NEW POWER HOUSE

*Real Estate:*

Land .....	\$8,000
Road and bridge .....	2,000

\$10,000

*Building:*

Building .....	\$45,000
Crane — hand operated .....	1,800
Railroad siding — coal handling to power house .....	30,000

*Boiler room:*

Boilers, erected .....	\$36,000
Brick settings erected .....	5,000
Stokers and fans .....	17,000
Air ducts .....	500
Ash gates .....	300
Ash cars and track .....	400
Feed water heater, erected .....	1,300
Boiler feed pumps, erected .....	3,000
House pump and tank, erected .....	500
Coal bunker and gates, erected .....	6,000
Conveyor over bunker, erected .....	2,000
Coal scales and supports, erected .....	1,500
Coal shutes, erected .....	600
Chimney and footing, erected .....	7,500

76,800

*Engine Room:*

Turbo generator, erected .....	\$33,000
Condenser and pumps, erected .....	16,750
Exciter — 35 kilowatts .....	1,500

81,600

*Piping:*

High pressure steam .....	\$8,000
Low pressure steam .....	3,000
Boiler feed .....	2,000
Bearing — cooling water .....	200
Intake well and ducts .....	3,000

51,250

16,000

Public Service Commission, Second District

*Switchboard:*

1 exciter panel, 1 generator panel, 1 totalizing panel .....	\$4,800	
1 station auxiliary panel, 1 step-up transformer panel .....	1,000	
2 22,000 volt line panels and lightning arresters .....	2,500	
2 2,300 volt feeder panels.....	1,600	
		9,900
Wiring, conduits, etc.....	\$2,500	
Transformers — 3 750 KVA, step up	5,300	
Transformers for station lighting....	400	
		8,200
		<u>\$253,750</u>
Contingencies at 5 per cent.....	\$12,698	
Interest — 4 per cent.....	10,158	
Superintendence — 1 per cent.....	2,539	
Engineering at 6 per cent.....	15,237	
		40,632
Total overhead at 16 per cent.....		<u>\$294,382</u>
Total for new plant.....		<u><u>\$294,382</u></u>

(B) SUBSTATIONS AND CONNECTING TRANSMISSION AND DISTRIBUTION LINES.

*Substation and equipment:*

Land.....	\$2,500	
Outdoor steel structure and foundations	1,000	
Step down transformers.....	6,000	
2 lightning arresters .....	1,600	
Regulators in old power house.....	3,000	
Street lighting apparatus in power house .....	3,000	
		<u>\$17,100</u>

## Public Service Commission, Second District

<i>Transmission line:</i>	
New power house to substation.....	\$18,000
<i>Distribution system:</i>	
1 2,300 volt line out of new power house, 1 mile.....	\$1,500
Connecting single phase feeders to 3 phase feeders .....	1,540
New poles and fixtures.....	2,250
	<u>5,290</u>
	<u>\$40,390</u>
Total overhead at 16 per cent. ....	<u>6,462</u>
Total for substations and connecting transmission and distribution lines . . . . .	<u>\$46,852</u>

## (C) MISCELLANEOUS ADDITIONS AND BETTERMENTS

Service and short line extensions....	\$15,000
Electric meters .....	7,500
Distribution transformers .....	5,000
Line extensions .....	8,000
Lightning arresters and grounds....	950
Conduits under railroad bridges....	3,000
Transferring to joint poles.....	2,500
Street lighting additions.....	1,500
Meter testing apparatus.....	640
Accounting department equipment...	1,699
Consumer's installations .....	300
Automobile — line superintendent ...	275
Linemen's truck .....	2,500
Additions to storeroom.....	900
Sundries .....	1,000
	<u>\$50,764</u>
Total overhead at 16 per cent. ....	<u>\$8,122</u>
Total for miscellaneous additions and betterments.	<u>\$58,886</u>

Public Service Commission, Second District

Grand total of proposed expenditures for additions and betterments during the year 1916.....	\$400,320
Total par and face value of securities herein authorized .....	\$322,930
Plus unexpended proceeds of bonds authorized in Case No. 5308 for proposed capital expenditures transferred hereto by order in that proceeding of even date herewith.....	77,300
	<u>400,230</u>
Amount unprovided for.....	<u>\$90</u>

in so far as the same may be applicable provided:

(1) That such securities or the proceeds thereof shall be applied on such new construction summarized in subdivisions (A) (B) and (C) hereof only in so far as the same is a real increase in the fixed capital of the petitioner and not a replacement of any part of such fixed capital or substitution for wasted capital or other loss properly chargeable to income in accordance with the definitions contained in the uniform system of accounts for electrical corporations adopted by this Commission.

(2) That there shall be no charges to fixed capital on account of engineering services in connection with such construction unless such engineering services shall have been rendered either by other than the regular officers and employees of the corporation or, in a proper case, where such services may have been rendered by certain of such officers or employees, under an express assignment to such construction work.

(3) That if there shall be required for the aforesaid purposes, subject to the limitations herein contained, a sum less than an amount equal to the par and face value of the securities herein authorized, no portion of the proceeds of the securities herein authorized over the actual proceeds thereof so required shall be used for any purpose without the further order of this Commission.



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Public Service Commission, Second District

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(4) That the unit prices contained in Exhibit "A" of the petition are not intended to be and must not be construed by the petitioner as having been determined upon by this Commission as the actual cost of the property and work to be acquired and done and thus properly chargeable to fixed capital, but are intended and shall be construed only to be a present estimate of the probable cost of such property and work, the actual cost of which must be actual expenditures made as defined by the Commission's uniform system of accounts for electrical corporations.

(5) That the proceeds realized from the sale of securities herein authorized, until used for the authorized purposes, shall be either deposited to the credit of the company in a special bank account, or otherwise kept separately. The purpose and intent of this provision is to require the segregation of the proceeds of securities from the company's other cash, so that a trial balance of the company's accounts at any time will show the extent to which its balance of cash is contracted for for the purposes enumerated herein for which the proceeds of securities are authorized.

5. That if the said securities of a total par and face value of \$353,100 herein authorized shall be sold at such price as will enable the company to realize net proceeds of more than \$323,020, no portion of the proceeds of such sale in excess of the last aforesaid sum shall be used for any purpose without the further order of this Commission.

6. That none of the said bonds herein authorized shall be hypothecated or pledged as collateral by the Binghamton Light, Heat and Power Company unless any such hypothecation or pledge shall have been expressly approved and authorized by this Commission.

7. That the Binghamton Light, Heat and Power Company shall for each six months' period ending December thirty-first and June thirtieth file not more than thirty days from the end of such period a verified report showing:

(a) What securities have been sold, exchanged or otherwise disposed of during such period in accordance with the authority contained herein and the date of such sale or disposition.

(b) To whom such securities were sold.

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Public Service Commission, Second District

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(c) What proceeds were realized from such sale.

(d) Any other terms and conditions of such sale.

(e) In detail the amount expended for each of the purposes specified herein during such period of the proceeds of the securities herein authorized, and such report shall show for each of said purposes to what account or accounts under the uniform system of accounts for electrical corporations the expenditures for such purposes have been charged, giving all details of any credits to fixed capital in connection with such expenditures.

(f) A summary of the expenditures for each of said purposes during the period covered by the report.

(g) A summary showing the expenditures during such period by the prescribed accounts.

(h) The amount remaining unexpended of the proceeds of the securities sold to be used for the purposes authorized herein, which amount shall be the balance at that date in the special deposit which is to be established in accordance with the requirements of subdivision (5) of ordering clause No. 4 of this order.

In reporting under subdivision (f) and (g) of this clause there shall be further shown the expenditures of the proceeds of securities herein authorized to the beginning of the period reported upon and a total showing such expenditures, to the end of the period, together with a statement of the balances in the fixed capital accounts as of the beginning and ending of such period.

Such reports shall continue to be filed until all of said securities shall have been sold or disposed of and the proceeds expended or used in accordance with the authority contained herein and if during any period no securities were sold or disposed of or proceeds expended or used, the report shall set forth such fact.

8. That the company shall within thirty days of the service of this order advise this Commission whether or not it accepts the same with all its terms and conditions.

Finally, it is determined and stated, That in the opinion of this Commission the money to be procured by the issue of said securities herein authorized is reasonably required for the purposes specified in this order and that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

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Public Service Commission, Second District

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In the Matter of the Complaint of PUPILS RESIDING IN FRANKLIN DELAWARE COUNTY, against THE NEW YORK, ONTARIO AND WESTERN RAILWAY COMPANY, Asking that Train No. 14 (Passenger and Milk) Stop at Franklin

Case No. 5625

In the Matter of the Complaint of RESIDENTS OF MAYWOOD, DELAWARE COUNTY against THE NEW YORK, ONTARIO AND WESTERN RAILWAY COMPANY, Asking that Train No. 14 (Passenger and Milk) Stop at Maywood

Case No. 5626

(Public Service Commission, Second District, August 16, 1916)

Applications for order compelling the New York, Ontario and Western Railway Company to stop a certain train regularly at Franklin and Maywood for the benefit of school children.

A number of children residing at the two stations of the line of the New York, Ontario and Western Railway Company desire to attend high school at Sidney. There are several other high schools nearer and more convenient to the two stations than the one at Sidney. While it is true that an additional convenience would be afforded if the stops asked for were made, nevertheless, the railroad schedule must be made up with regard to the public convenience along the entire line. Under the circumstances of this case *held*, that an order requiring the stops to be made would not be justified. Application denied.

BY THE COMMISSION.—In the first of the above entitled cases, six school children residing at or near Franklin station on the line of the New York, Ontario and Western Railway Company petitioned the Commission to have train No. 14 stop at Franklin station to enable them to commute daily to and from Sidney so they might attend the Sidney High School. In the other case, a petition is filed by numerous residents of Maywood station or Sidney Center on the lines of the same railway also asking to have train No. 14 stop at their station claiming that they are without train service from the north from 11:53 A. M. until 8:08 P. M., although other trains pass through.

A hearing was held at the office of the Commission in the city

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Public Service Commission, Second District

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of Albany on August 8, 1916, at which time Mr. Herbert Preston, the superintendent of schools at Sidney, N. Y., appeared for the petitioners in both cases and the railway company was represented by its attorney, Mr. C. L. Andrus.

Maywood or Sidney Center and Franklin are eight and eleven miles respectively south of Sidney on the lines of the New York, Ontario and Western Railway Company. There are two other stations between Sidney and Maywood and there are also two between Franklin and Walton. The petition in the Maywood case did not purport to be on behalf of school children, yet Mr. Preston stated that there were a few pupils at Maywood desiring to attend the Sidney High School. The petitioning pupils have not attended the Sidney High School prior to this time but desire to go to the high school there beginning in September of this year. About five miles from Franklin station is Franklin village where there is a good high school. Ten miles south at Walton, there is another high school substantially equal in all respects to the one at Sidney. Pupils at Franklin and Maywood desiring to attend school at Sidney and commuting each day would arrive at Sidney shortly before 9:00 A. M. The school closes at 3:30 P. M., and there is no train back to Franklin and Maywood until 7:48 P. M. They could, however, go to the high school at Walton arriving there about 8:00 A. M. and return to their homes on a train leaving Walton about 6:40 in the evening. There is no assurance that any specific number of pupils would attend the high school in either Sidney or Walton even though the train accommodations were better. School children get a commutation rate between Sidney and Franklin of one and one-half cents per mile making the fare about fifteen cents.

Train No. 14 is a milk train carrying one coach and doing a local passenger business from Oswego to Sidney. The leaving time from Sidney is 3:35 P. M. and it is only scheduled to stop at three points south of Sidney. It is a fairly heavy train and according to the evidence, it is very desirable that it should not arrive in New York any later than the present scheduled time which is 11:05 P. M. The road is up grade all the way south

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Public Service Commission, Second District

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from Sidney to Northfield and when the train carries as many as eighteen cars which is sometimes the case, it might experience some difficulty in starting if a stop were made at Maywood or Franklin. Both of these places are small communities in a rich farming country. There is no question but what several minutes would be added to the schedule running time if stops were made at the two points in question. Train No. 14 occasionally stops at Maywood to cut out a car of milk but this is not done regularly and the place where the stop is made is not convenient for passengers desiring to leave the train there. Before the present year, it has been necessary on numerous occasions to have a pusher on this train when a stop was made at Maywood. Probably if this train were stopped at either Franklin or Maywood, the other stations along the road would demand similar accommodations and this would cause serious inconvenience in the operation of this train.

These cases present a situation where the Commission would like if possible to find some way to give the relief requested without seriously interfering with the service of the railroad. The facts presented, however, do not seem to justify the Commission in ordering train No. 14 to make regular stops at Franklin and Maywood. The traffic which is offered is not in and of itself any inducement to the railroad from a business standpoint and the starting and stopping of the train at these two places would probably cost far in excess of the revenue derived therefrom. It is true that an additional convenience would be afforded if these stops were made but on the other hand, it is possible at the present time for pupils to attend the high school in either Sidney or Walton without difficulty, the only inconvenience being that they are obliged to remain in either one of the two places somewhat longer than they desire after the close of the afternoon session. It is possible to drive to the high school at Franklin village which would perhaps be more convenient than to go by train to either Sidney or Walton.

The schedule of the railroad company must be made up with regard to the accommodation of all the people residing along its

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Public Service Commission, Second District

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lines from terminal to terminal, and it invariably happens that some people along the road are discommoded by the leaving and strating time of certain trains. In view of the distances which the trains operate, however, this cannot always be overcome. If sufficient traffic should ever develop at the local stations south of Sidney to warrant a local passenger train in the middle of the afternoon, the railroad company will undoubtedly provide the train. However, that situation does not now exist. Under the circumstances, therefore, we do not see how we could justify an order requiring train No. 14 to stop at Franklin or Maywood, and it is, therefore,

Ordered, That the application of the petitioners herein in each of these cases be and the same hereby is denied and the cases closed on the records of this Commission.

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In the Matter of the Petition of HAMMOND LIGHT AND POWER COMPANY, INC., under Section 68 of the Public Service Commissions Law, for Permission to Construct an Electric Plant and Lines in the Incorporated Village of Hammond, St. Lawrence County, and for Approval of the Exercise of Rights and Privileges under a Franchise Therefor Received from Said Village; and under Section 69 of the Public Service Commissions Law, for Authority to Issue \$10,000 Common Capital Stock

Also Joint Petition, under Section 70, of WILLIAM SOPER and HAMMOND LIGHT AND POWER COMPANY, INC.

Case No. 5419

(Public Service Commission, Second District, August 16, 1916)

Application by the Hammond Light and Power Company, Inc., to issue \$10,000 of its common capital stock to be sold at not less than par for the purpose of purchasing the electric plant now owned by William Soper in the village of Hammond, N. Y.

The petition for authority to issue common capital stock was filed on February 7, 1916, and a supplemental petition was subsequently and on

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Public Service Commission, Second District

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March 1, 1916, filed with the Commission. On the 24th day of May, 1916, the report of the division of light, heat and power was filed and on August 14, 1916, the report of the division of capitalization was made. Permission granted with the usual restrictions.

**By THE COMMISSION.**— Ordered as follows:

1. That the Hammond Light and Power Company, Inc., is hereby authorized to issue \$10,000 of its common capital stock, which shall be sold at a price not less than the par value thereof, to give net proceeds of at least \$10,000.

2. That said stock of the total par value of \$10,000 so authorized, or the proceeds thereof to the amount of \$10,000, shall be used solely and exclusively for the acquisition of the electric plant located in the village of Hammond, N. Y., now owned by William Soper, including real estate, power house and distributing system as more particularly described in Schedule "A" attached to the petition herein, verified the 26th day of February, 1916, and for additions and betterments to be made to the plant and property above described as detailed in Schedule "C" attached to the petition herein, in so far as the same may be applicable provided:

(1) That such stock or the proceeds thereof shall be applied on such new construction summarized herein only in so far as the same is a real increase in the fixed capital of the petitioner and not a replacement of any part of such fixed capital or substitution for wasted capital or other loss properly chargeable to income in accordance with the definitions contained in the uniform system of accounts for electrical corporations adopted by this Commission.

(2) That there shall be no charges to fixed capital on account of engineering services in connection with such construction unless such engineering services shall have been rendered either by other than the regular officers and employees of the corporation, or, in a proper case where such services may have been rendered by certain of such officers or employees under an express assignment to such construction or improvement work.

(3) That the prices contained in Schedules A and C of the petition are not intended to be and must not be construed by the petitioner as having been determined upon by this Commission as

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the actual cost of the property and work to be acquired and done and thus properly chargeable to fixed capital, but are intended and shall be construed only to be a present estimate of the probable cost of such property and work, the actual cost of which must be actual expenditures made as defined by the Commission's uniform system of accounts for electrical corporations.

(4) That the proceeds realized from the sale of stock herein authorized until used for the authorized purposes shall be either deposited to the credit of the company in a special bank account, or otherwise kept separately. The purpose and intent of this provision is to require the segregation of stock proceeds from the company's other cash so that a trial balance of the company's accounts at any time will show the extent to which its balance of cash is contracted for for the purposes enumerated herein for which the proceeds of stock are authorized.

3. That the Hammond Light and Power Company, Inc., shall for each six months' period ending December thirty-first and June thirtieth file not more than thirty days from the end of such period a verified report showing:

(a) What stock has been sold or otherwise disposed of during such period in accordance with the authority contained herein and the date of such sale or disposition.

(b) To whom such stock was sold.

(c) What proceeds were realized from such sale.

(d) Any other terms and conditions of such sale.

(e) In detail the amount expended for each of the purposes specified herein during such period of the proceeds of the stock herein authorized, and such report shall show for each of the said purposes to what account or accounts under the uniform system of accounts for electrical corporations the expenditures for such purposes have been charged, giving all the details of any credits to fixed capital in connection with such expenditures.

(f) A summary of the expenditures for each of such purposes during the period covered by the report.

(g) A summary showing the expenditures during such period by the prescribed accounts.



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Public Service Commission, Second District

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(h) The amount remaining unexpended of the proceeds of stock sold to be used for the purposes authorized herein, which amount shall be the balance at that date in the special deposit which is to be established in accordance with the requirements of subdivision (4) of ordering clause No. 2 of this order.

In reporting under subdivisions (f) and (g) of this clause there shall be further shown the expenditures of the proceeds of the stock herein authorized to the beginning of the period reported upon and a total showing such expenditures to the end of the period, together with a statement of the balance in the fixed capital accounts as of the beginning and ending of such period.

Such reports shall continue to be filed until all of said stock shall have been sold or disposed of and the proceeds expended in accordance with the authority contained herein, and if during any period no stock was sold or disposed of or proceeds expended, the report shall set forth such fact.

4. That this proceeding is continued on the records of this Commission until the property herein authorized to be purchased shall have been acquired and the new construction authorized to be done shall have been completed and an allocation of the petitioner's property to the fixed capital accounts as prescribed in the uniform system of accounts for electrical corporations shall have been submitted to and approved by this Commission.

5. That the company shall within thirty days of the service of this order advise this Commission whether or not it accepts the same with all its terms and conditions.

Finally, it is determined and stated, that in the opinion of this Commission the money to be procured by the issue of said stock herein authorized is reasonably required for the purposes specified in this order and that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

In the Matter of the Petition of NORWICH GAS AND ELECTRIC COMPANY, under Section 69 of the Public Service Commission Law, for Authority to Issue \$70,000 Common Capital Stock

Case No. 5454

(Public Service Commission, Second District, August 16, 1916)

Application of the Norwich Gas and Electric Company to issue \$61,500 par value of its common capital stock to be sold at not less than par, the proceeds of which are to be used for certain specified purposes.

The purposes for which the moneys now sought to be secured are needed include the reimbursement of the treasury of the petitioner for moneys actually expended and for the discharge and refunding of its indebtedness as of December 31, 1915, and for additional working capital. Permission granted with the usual restrictions.

Petition filed March 1, 1916.

Exhibit C — Details of fixed capital expenditures January 1, 1913, to October 31, 1915, filed March 23, 1916.

Report of division of capitalization dated April 17, 1916.

Report of gas engineer dated April 25, 1916.

Report of electrical engineer dated June 28, 1916.

Final report of division of capitalization dated July 24, 1916.

Supplemental petition filed July 29, 1916.

BY THE COMMISSION. — Now, therefore, upon the foregoing record, ordered as follows:

1. That the proposed journal entries contained in the final report of the division of capitalization in this proceeding, dated July 24, 1916, which on July 24, 1916, was sent to the corporation, such entries being listed on pages 20 to 22 inclusive thereof, shall be entered upon the books of the Norwich Gas and Electric Company, and that within thirty days from the service of this order verified proof shall be submitted to this Commission that such entries have been made.

2. That the Norwich Gas and Electric Company is hereby authorized to issue \$61,500 par value of its common capital stock, which shall be sold at not less than the par value thereof to give net proceeds of at least \$61,500.

## Public Service Commission, Second District

3. That said stock of the total par value of \$61,500 so authorized or the proceeds thereof to the amount of \$61,500 shall be used solely and exclusively for the following purposes:

(a) For the reimbursement of the treasury of the petitioner for moneys actually expended from income from January 1, 1913, to December 31, 1915, not obtained from the issue of stocks, notes, bonds or other evidence of indebtedness of such corporation, for the acquisition of additions and betterments to its property and for the discharge of its indebtedness . . . . .		\$15,202 99
(b) For the discharge and lawful refunding of its indebtedness outstanding at December 31, 1915, or the renewals thereof as follows:		
Bills payable . . . . .	\$12,216 56	
Accounts payable . . . . .	5,522 95	
Accrued interest . . . . .	1,416 67	
Accrued taxes . . . . .	1,494 18	
Accrued interest . . . . .	606 53	
Accrued water . . . . .	48 58	
		21,305 47
(c) For working capital . . . . .		25,000 00
		\$61,508 46
Amount unprovided for . . . . .		\$8 46

in so far as the same may be applicable provided that such working capital shall not be disbursed by such company for purposes properly chargeable to income, but shall be retained to enable the company to carry its accounts receivable and to provide a sufficient amount of materials and supplies to economically transact its business.

4. That if the said stock of a total par value of \$61,500 herein authorized shall be sold at such price as will enable the company to realize net proceeds of more than \$61,508.46, no portion of

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the proceeds of such sale in excess of the last aforesaid sum shall be used for any purpose without the further order of this Commission.

5. That the Norwich Gas and Electric Company shall for each six months' period ending December thirty-first and June thirtieth file not more than thirty days from the end of such period a verified report showing:

(a) What stock has been sold or otherwise disposed of during such period in accordance with the authority contained herein and the date of such sale or disposition.

(b) To whom such stock was sold.

(c) What proceeds were realized from such sale.

(d) Any other terms and conditions of such sale.

(e) With respect to subdivisions (b) and (c) of ordering clause No. 3 herein there shall be shown the amount expended in reasonable detail of the proceeds for the purposes specified herein during such period and stating to what account or accounts under the uniform system of accounts for gas and electrical corporations such expenditures have been charged.

(f) The amount remaining unexpended of the proceeds of stock sold to be used for the purposes authorized herein.

Such reports shall continue to be filed until all of said stock shall have been sold or disposed of and the proceeds expended in accordance with the authority contained herein, and if during any period no stock was sold or disposed of or proceeds expended, the report shall set forth such fact.

6. That the Norwich Gas and Electric Company is hereby authorized to sell \$61,500 par value of its common capital stock, herein authorized to be issued, to the Associated Gas and Electric Company.

7. That the Associated Gas and Electric Company is hereby authorized to acquire 615 shares each of the par value of \$100, aggregating the total par value of \$61,500 of the common capital stock of the Norwich Gas and Electric Company, authorized to be issued herein.

8. It is nevertheless expressly provided that in all respects

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Public Service Commission, Second District

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other than as directed in ordering clause No. 1 hereof, this order shall not be effective, and particularly that no stock shall be issued or sold hereunder by the applicant, nor shall the issue or sale of any such stock be deemed to have been approved and authorized by this Commission unless and until compliance with the requirements of ordering clause No. 1 of this order shall have been made, reported to and approved as sufficient by this Commission.

9. That the authority contained in this order to issue stock is upon the express condition that the petitioner accepts and agrees to comply in good faith with the provisions hereof, and before any stock is issued pursuant hereto and within thirty days from the service hereof the said company shall file with this Commission a satisfactorily verified stipulation duly authorized by its board of directors, accepting this order with all its terms and conditions, and such order shall be void and of no force or effect until such stipulation shall have been filed as required herein.

Finally, it is determined and stated, That in the opinion of this Commission the money to be procured by the issue of said stock herein authorized is reasonably required for the purposes specified in this order and that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

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In the Matter of the Petition of the GENEVA, SENECA FALLS AND AUBURN RAILROAD COMPANY, INC., under Section 85 of the Railroad Law, for Permission to Cease the Operation of that Part of its Electric Railroad Between Garden Street in the Incorporated Village of Seneca Falls and Cayuga Lake Park

Case No. 5605

(Public Service Commission, Second District, August 16, 1916)

Permission asked by a railroad company for leave to cease operating a portion of its railroad from October first to April thirtieth of each year.

The Geneva, Seneca Falls and Auburn Railroad Company, Inc., desires to cease operating during the winter season that portion of its right of way from Garden street, in the village of Seneca Falls to Cayuga Lake Park, a distance of 1.88 miles because of the insufficiency of the traffic to pay operating expenses. Two former applications in regard to this

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Public Service Commission, Second District

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line of the road and the service thereon have been made and in each case the matter was decided against the road. It is conceded that no material change in traffic conditions has occurred. Application denied.

BY THE COMMISSION.— This is an application by the Geneva, Seneca Falls and Auburn Railroad Company, Inc., under section 85 of the Railroad Law for permission to cease operating from October first to April thirtieth each year that part of its railroad from Garden street in the village of Seneca Falls to Cayuga Lake Park, a distance of one and eighty-eight hundredths miles, the reason being that the revenue during that period is insufficient to pay operating expenses and that the cost of keeping the line open in winter is a severe financial burden. In September, 1911, a similar application was made. Case No. 2530. After hearings and conferences it was withdrawn at the suggestion of the Commission, it appearing that while winter operation was unprofitable, the convenience of a number of people was subserved thereby. December, 1913, a complaint was filed asking for additional service on this portion of the line during the winter. The Commission, after a hearing, ordered that cars be operated in accordance with schedules fixed in the order, six round trips per day. Case No. 4024. According to statements of counsel and the evidence on the hearing of the present case there has been no material change in traffic conditions since the earlier cases and no evidence has been adduced to justify a reversal of the Commission's former rulings. The portion of the line covered by the petition is operated during the summer months at a profit and while winter operation is certainly not profitable, such evidence as has been presented indicates that there are carried, from Labor Day to Memorial Day, exclusive, an average of about nine passengers for each trip. This indicates a substantial winter demand for the service. The excess of operating expenses over revenue is figured by the company at \$430.79 for the only year concerning which evidence was presented. This loss may be recouped by an increase in fares provided in Case 5488, herewith decided. It is, therefore —

Ordered: That the application be and the same is hereby denied.

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Public Service Commission, Second District

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In the Matter of the Petition, under Section 53 of the Public Service Commissions Law, of NEW YORK STATE RAILWAYS, for Permission to Construct a Second Track in Euclid Avenue, Syracuse, and for Approval of the Exercise of Franchises Therefor Received from the City

Case No. 5373

(Public Service Commission, Second District, August 16, 1916)

**Application for permission to lay a second track on Euclid avenue in the city of Syracuse.**

The New York State Railways now has a track on Euclid avenue, Syracuse, and seeks permission to put in a second track on the same avenue and for the approval of two separate franchises for that purpose. The object now sought is to make a continued double track through Euclid avenue. There is no objection on the part of the property holders. Permission granted with the usual restrictions.

BY THE COMMISSION.—The New York State Railways applies under section 53 of the Public Service Commissions Law for permission to begin construction of an additional track on Euclid avenue in the city of Syracuse and for the permission and approval of the Commission to the exercise of two separate franchises for that purpose. There is now a single track in Euclid avenue from College Place to Westcott street, and double tracks on the streets last named. The extension desired is for the purpose of making the double track continuous through Euclid avenue. On the hearing it appeared that it would be necessary to widen the pavement on Euclid avenue and there was much opposition by property owners because of the additional expense thereby to be imposed upon them. Legislation of the current year affecting the city of Syracuse having removed that burden, there is no further opposition by property owners. The franchises are:

1. Granted by the common council April 26, signed by the mayor May 3d and approved by the board of estimate and apportionment May 5, 1915, granting consent to the New York

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State Railways, its successors and assigns, to construct, maintain and operate an additional track on Euclid avenue commencing at a point in Euclid avenue at the end of the present double track, said point being 124.5 feet easterly from the center of College place, and running thence easterly along Euclid avenue 2,210 feet to a point 100 feet east of the easterly line of Lancaster avenue and there connecting with the present track of the company with the necessary turnouts, connections and switches; that permission and consent be given to the said New York State Railways, its successors and assigns, to erect poles and string the necessary wires and overhead equipment in and upon said street and along the route above designated and operate over said track by any motive power which now or at any time hereafter may be lawfully used or employed on this route.

2. Granted by the common council November 8th, signed by the mayor November 10th and approved by the board of estimate and apportionment November 17, 1915, granting permission to the New York State Railways, its successors and assigns, to construct, maintain and operate an additional track on Euclid avenue, commencing in Euclid avenue at a point 100 feet east of the east line of Lancaster avenue and there connecting with the double track as it is to be extended, and running from thence in an easterly direction along Euclid avenue to the intersection of Euclid avenue and Westcott street, and there connecting with the present double track of the company, with the necessary turnouts, connections and switches; that permission and consent be given to the said New York State Railways, its successors and assigns, to erect poles and string the necessary wires and overhead equipment in and upon said street and along the route above designated and operate over said track by any motive power other than locomotive steam power which now or at any time hereafter may be lawfully used or employed on this route.

It is determined and stated, That the construction of said second track and the exercise of each of said franchises are necessary and convenient for the public service and it is —

Ordered, 1. That the permission and approval of the Commis-



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sion be given to New York State Railways, to construct, maintain and operate an additional track on Euclid avenue, in accordance with the terms and provisions of the franchises aforesaid;

2. That the permission and approval of the Commission be given to said New York State Railways to exercise the rights and privileges conferred by each of said franchises, subject, however, to all the terms and conditions thereof.

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In the Matter of the Complaint of the SHELTER ISLAND BOARD  
OF TRADE against THE LONG ISLAND RAILROAD COMPANY  
Asking for Better Passenger Train Service

Case No. 5544

(Public Service Commission, Second District, August 24, 1916)

Train service from New York city to certain stations on Long Island sought to be improved.

The morning train service from New York city to Riverhead, Greenport and Shelter Island found to be deficient on the spring and summer schedules of the Long Island Railroad Company. Suggestion that a better schedule be installed if possible in 1917 during the spring months.

By THE COMMISSION.— Complaint having been made by the Shelter Island board of trade against the Long Island Railroad Company, asking for better passenger train service in the morning from New York city to Riverhead, Greenport and Shelter Island; and the matter having come on for a hearing before this Commission on the 12th day of June, 1916, when both parties were present or represented, and evidence was taken and arguments made in support of, and in opposition to, the said complaint; and it appearing to the Commission that the situation complained of is one which relates particularly to the early spring and summer schedules of the respondent rather than to its fall and winter schedules, and that while a better morning train service between New York city and the points mentioned should be

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Public Service Commission, Second District

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installed if possible next year during the spring months as hereinafter suggested, there is no urgent need for such service between now and next spring owing to the fact that the early morning travel between New York and the points mentioned is, and for the remainder of the year will continue to be, comparatively light; and the Commission being also of the opinion that a definite determination of the question raised by this complaint should so far as this Commission is concerned, be deferred until shortly after the 1st of January, 1917, so that any order made in relation to the matter may become effective at the time that respondent's early spring schedules for 1917 go into operation — it appearing preferable to the Commission that a question of this kind, which in the judgment of the Commission relates to the future and not to the immediate present, shall finally be decided in the light of the conditions which may exist shortly before the proposed changes shall take effect rather than now, when it is impossible to foretell what the general conditions in respect to the business of respondent, during the year 1917, will be; it is, hereby

Ordered that this case be, and the same hereby is, closed upon the records of the Commission, with leave to the complainant, however, to reopen same on ten days' notice to respondent at any time after the 1st of January, 1917, and with the suggestion to respondent, on the part of the Commission, that prior to January 1, 1917, it shall give careful consideration to the proposal that its train schedules for the spring of 1917 shall provide for a substantially better morning trains between New York city and Shelter Island than the one which is now being operated; the Commission, as at present advised, being impressed with the view that, if it can be arranged without injustice to respondent and to its patrons other than the present complainants, a train at least partially express in character should be operated during the spring time (and if possible also during the summer months) to provide for the needs of the large number of summer residents and seekers after summer homes at the eastern end of Long Island, who require, during several months each year, a train

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**Public Service Commission, Second District**

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which will enable them to leave New York early in the morning which will give them a long enough time to transact their affairs and return to the city, with reasonable comfort the same afternoon.

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In the Matter of the Petition of the PUBLIC SERVICE CORPORATION OF LONG ISLAND under Section 69 of the Public Service Commissions Law, for Authority to Issue \$138,750 in First Mortgage 5 Per cent Gold Bonds under an Existing Mortgage; and \$67,100 Common Capital Stock

Case No. 4974

(Public Service Commission, Second District, August 24, 1916)

**Application by a public service corporation for leave to issue certain bonds and common capital stock.**

Permission sought by the Public Service Corporation of Long Island to issue \$377,000 face value of its 5 per cent thirty-year first mortgage bonds and \$107,000 par value of its common capital stock. The proceeds of which are to be used for certain purpose specifically set forth in the order herein subject to the usual limitations.

BY THE COMMISSION.— Under date of July 1, 1915, an order was entered in this proceeding authorizing the Public Service Corporation of Long Island to issue \$377,000 face value of its 5 per cent thirty-year first mortgage bonds and \$107,000 par value of its common capital stock and to use the proceeds of such securities for certain specific purposes in said order described, subject, however, to the limitations therein set forth. The order further provided that the proceeds of such securities could be used only for expenditures made before December 1, 1915, on the specified additions, betterments and extensions for which such securities were therein authorized. By verified reports filed herein it appears that on December 31, 1915, of the stocks and bonds then authorized to be issued and sold there remained unissued \$78,000 of stock and \$259,000 of bonds, and that of the proceeds of sales of stock and bonds which had actually been

issued and sold there remained unused and in hand as of the last mentioned date the sum of \$10,792.46. Under date of February 12, 1916, the corporation petitioned the Commission to extend the period during which the proceeds of the securities authorized could be used, one year from December 1, 1915.

In accordance with the requirements of ordering clause No. 7 of the aforesaid order the accounts and properties of the petitioner have been examined by the representatives of the Commission, but the tentative report of the results of such examination has not been completed. Pending the completion of this report and its consideration, the determination by the Commission of all questions relative to the accounting by the petitioner for the expenditures of the proceeds of securities heretofore and herein authorized and the expenditures heretofore made and charged to fixed capital since the organization of the petitioner is reserved. At a hearing held at the office of the Commission in the city of Albany on August 16, 1916, the president of the corporation stated that it would be seriously prejudiced in the conduct of its affairs and would be unable to comply with its franchise obligations to its serious detriment and damage, if the Commission should refuse to permit the corporation to use the proceeds of the securities authorized by the order of July 1, 1915, during the year ending December 1, 1916, in payment for additions, extensions and improvements made during such period.

Upon the foregoing and upon the agreement of the petitioner as entered in the minutes of said hearing of August 16, 1916, to comply with all the requirements of this Commission in this matter, and especially the order of July 1, 1915, and of the amendment thereof, it is ordered as follows:

1. That ordering clause No. 11 of the order herein dated July 1, 1915, be and the same is hereby amended to read as follows: "11. That the proceeds of stocks and bonds herein authorized shall only be used for expenditures made before December 1, 1916, for additions, betterments and extensions to the extent and in the manner herein authorized, or for the payment of obligations incurred therefor prior to December 1, 1916."

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Public Service Commission, Second District

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2. That all questions relating to the accounting by the petitioner for the expenditures of the proceeds of securities herein authorized and for the expenditures heretofore made and charged to fixed capital since the organization of the petitioner be and they hereby are reserved for future determination by this Commission.

3. That the Public Service Corporation of Long Island shall within twenty days after September 1, 1916, file with this Commission a report giving full details as to the sale of securities and disposition of the proceeds thereof during the period from December 1, 1915, to August 31, 1916, and shall within twenty days after the first of each calendar month thereafter file for the preceding month a report verified by its president and its principal accounting officer showing:

(a) What securities have been sold or otherwise disposed of during such period in accordance with the authority contained herein and the date of such sale or disposition;

(b) To whom such securities were sold;

(c) What proceeds were realized from such sale;

(d) Any other terms and conditions of such sale;

(e) In detail the amount expended during the period covered by such report for each of the purposes for which the expenditures of such proceeds are authorized, and such report shall show to what account or accounts under the uniform system of accounts for gas corporations the expenditures for each of such purposes have been charged, giving all the details of any credits to fixed capital in connection with such expenditures, which aforesaid detail of expenditures of proceeds shall include verified copies of all vouchers, with supporting invoices, payrolls, material warrants and all other evidences of the actual disbursements of such proceeds, including verified copies of journal entries with a full explanation of the necessity therefor, reflecting and effecting the disbursements of the proceeds of the aforesaid securities.

In reporting under subdivisions (b) and (c) of this clause there shall be further shown the expenditures to the beginning of the period reported on and a total showing the expenditures to the end of the period.

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Public Service Commission, Second District

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4. From time to time as the company, its officers, agents, attorneys or representatives shall draw down or receive from the trustee under its first mortgage any proceeds derived from the sale of securities for the purpose set forth in this order and in the one of July 1, 1915, it shall file with this Commission a verified copy of each and every document presented to and filed with such trustee and required by it as condition precedent to the payment of any of such proceeds to the company, and if such trustee shall require from time to time a detailed list or lists of the vouchers covering the expenditures made by the company, it shall also furnish this Commission with a verified copy of each and every such list.

5. That the company shall within ten days of the service of this order advise this Commission whether or not it accepts the same with all its terms and conditions.

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In the Matter of the Complaint of RESIDENTS OF THE INCORPORATED VILLAGE OF SAG HARBOR, L. I., against The LONG ISLAND RAILROAD COMPANY; Alleging the Unwarranted Closing of Garden Street in Said Village by Said Company

Case No. 5624

(Public Service Commission, Second District, August 24, 1916)

The question of the title to real property is one of which the Commission has no jurisdiction.

Certain residents of Sag Harbor, L. I., brought the present application against the Long Island Railroad Company because of the closing by the latter of Garden street in that village. The only real question involved is the ownership of the strip of land which complainants contend is a public highway and a continuation of Garden street where respondents claim it to be their private property. *Held*, that the jurisdiction of the Commission does not extend to this question and that the matter must be submitted to a court of proper jurisdiction. Application denied.

By THE COMMISSION.— Complaint having been made by certain residents of Sag Harbor, L. I., against the Long Island Railroad

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Public Service Commission, Second District

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Company alleging the unwarranted closing of Garden street in said village by said company; and the matter having come on for a hearing before this Commission on the 4th day of August, 1916, when both sides were represented and testimony and arguments were presented in support of, and in opposition to, the said complaint; and it having transpired at the said hearing that the only real question involved in the present proceeding is one as to which, in the opinion of the Commission, the Commission has no jurisdiction — a question, namely, as to the ownership of the strip of land which complainants contend is a public highway and a continuation of Garden street, while respondents assert that the property in question is not, and never has been, a public highway but has belonged to them uninterruptedly and in fee simple for many years; and the Commission being quite positive in its view that no order which it might make in a controversy of this kind would have any validity whatsoever, and that the point at issue must be submitted to a court having jurisdiction to try questions involving the title to real estate in order that a satisfactory settlement thereof may be arrived at; it is, hereby

Ordered, That this complaint be, and the same hereby is, dismissed for want of jurisdiction, and that the case be, and the same hereby is, closed upon the records of the Commission.

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In the Matter of the Complaint of the VILLAGE OF LONG BEACH, NASSAU COUNTY (by the Village Counsel) against LONG BEACH POWER COMPANY, as to Price Charged for Lighting the Streets by Electricity

Case No. 5478

(Public Service Commission, Second District, August 24, 1916)

In the absence of extravagant management and where possible returns are restricted by small population an order rate charged for electric lamp service will not be reduced.

Long Beach, Nassau county, is a village with electric street lighting, the system being operated by the Long Beach Power Company at a rate

## Public Service Commission, Second District

of thirty dollars per lamp. This proceeding is to compel a reduction of that rate. The company, however, shows that aside from the street lighting there are less than 400 people using electricity commercially in Long Beach and that the company is now operating at a loss. *Held*, that the amount charged by respondent is not excessive and that it would be an improper exercise of its powers for the Commission to order a reduction at this time. Complaint dismissed.

By THE COMMISSION.—Complaint having been made by the village of Long Beach, Nassau county, against the Long Beach Power Company, as to the price charged for lighting the streets of the village by electricity; and the matter having come on for a hearing before this Commission on the 14th day of April, 1916, and upon subsequent adjourned dates, when testimony and arguments were presented in support of, and in opposition to, the same complaint — the village contending that in determining the cost of certain of the street lamps to the village the company has charged to these lamps an excessive proportion of the cost of ducts which are used in part in connection therewith and in part in connection with the respondent's commercial lighting business, and that, treating these lamps separately from the rest of the system, their cost to the village should be materially reduced; and it having been shown on behalf of the respondent that when its plant was built in 1910 Long Beach was entirely undeveloped, that subsequent development has been slow, that the village of Long Beach now has a population of less than 400 inhabitants who use electricity for commercial purposes, that the business of respondent has never reached the point where any return on the original investment is being earned, that the entire net income of respondent from operation was, in the year 1915, \$4,867.70, which is wholly inadequate for the payment even of the outstanding interest charges of the respondent leaving out of account entirely any return to stockholders, that there is no way now open to respondent to increase its revenue or decrease its cost of operation, and that there has been no extravagance in the construction and maintenance of the plant; and the Commission, after careful inquiry into all the facts and circumstances submitted to it, being of the opinion that the amount charged by respondent for the so-called



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\$30 lamps which are in question in this preceeding is not excessive or unreasonable, and that the theory of complaint as to how a proper charge for these lamps should be ascertained cannot be accepted by the Commission as, under the circumstances of this case, correct, and that it would be improper exercise of the powers of the Commission to order a reduction in the charge for these lamps at the present time; it is, hereby —

Ordered, That this complaint be, and the same hereby is, dismissed and that the case be closed upon the records of the Commission.

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In the Matter of the PETITION OF THE WESTCHESTER STREET RAILROAD COMPANY, under Section 184 of the Railroad Law, for Approval of the Declaration of Abandonment of a Portion of its Constructed Route in the Town of Greenburgh, Westchester County

Case No. 5642

(Public Service Commission, Second District, September 7, 1916)

Where a street railroad line has been abandoned for a year as unprofitable and public demand for its continuance does not exist, such line may be formally abandoned.

In the town of Greenburgh, Westchester county, a stretch of railroad operated by the Westchester Street Railroad Company and known as the Mount Calvary Line became unnecessary because of the building of a State road parallel to it and from the inauguration of a jitney service to Calvary Cemetery. Application for abandonment granted.

BY THE COMMISSION.—The Westchester Street Railroad Company having filed for approval a declaration of abandonment of a portion of its route in the town of Greenburgh known as the Mount Calvary Line, together with a petition for leave to carry such abandonment into effect; and notice of a public hearing upon the said application having been duly given in accordance with the rules of the Commission and affidavits of the publication of said notice in certain newspapers designated by the Commission having been duly filed; and the public hearing thus duly adver-

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Public Service Commission, Second District

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tised having been held on the 25th day of August, 1916, at the office of the Commission in the city of New York, at which hearing representatives of the petitioner were present and also the attorney for the town board of the town of Greenburgh, the township in which the strip of track sought to be abandoned, is situated; and evidence having been presented in support of the said application, showing among other things that the line in question has virtually been abandoned for over a year, and that there is no longer any public demand for such line, and that for sometime prior to its abandonment it was operated at a heavy loss, and that the approaching completion of a State road along the strip of track in question and the inauguration of jitney service to Calvary Cemetery has rendered the continuance of service on this stretch of track wholly unnecessary; and no one appearing in opposition to the application for leave to abandon the same, and the attorney for the town of Greenburgh having on behalf of the said town stated that the said town would not be justified in opposing the said application; and the Commission being of the opinion, under all the circumstances, that the said application should be granted; it is, hereby —

Ordered, That the petition of the said Westchester Street Railroad Company for approval of declaration of abandonment of that portion of its constructed route in the town of Greenburgh known as the Mount Calvary Line, being in length about one and fourteen-hundredths miles, be and the same hereby is granted, and that the Secretary of the Commission be directed to indorse such approval upon said certificate as provided by section 184 of the Railroad Law; and that the case be closed upon the records of the Commission.

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Public Service Commission, Second District.

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In the Matter of the Joint Complaint of THE ATLAS PORTLAND CEMENT COMPANY, ALPHA PORTLAND CEMENT COMPANY, HELDERBERG CEMENT COMPANY, ALSEN'S AMERICAN PORTLAND CEMENT WORKS, KNICKERBOCKER PORTLAND CEMENT COMPANY, GLENS FALLS PORTLAND CEMENT COMPANY, ACME CEMENT CORPORATION against BOSTON AND MAINE RAILROAD, Asking that it Tariff P. S. C., 2 N. Y., No. 714, Be Suspended, and that a Regulation Therein Limiting Quantity of Cement to Be Included in a Mixed Carload Be Declared Improper

Case No. 5600

(Public Service Commission, Second District, September 7, 1916)

**FREIGHT rates for carload lot shipments of cement — what constitutes a fair rate cannot be raised and attack on mixed carloads of cement and other articles.**

Under the circumstances mentioned, it was held that the question in which the complainants are really interested — namely, the question of the fairness of the rates for straight carload shipments of cement now in force on the Boston and Maine Railroad — cannot properly be adjudicated in a proceeding brought to compel the withdrawal of a tariff on mixed carloads of cement and other specified articles; but that this question should be raised by a direct attack upon the straight carload rates, which has not been made in the present case with sufficient definiteness to warrant the making of an order herein affecting these rates.

Frank Lyon, for complainants.

W. A. Cole, for the respondent.

EMMET, Commissioner.—A tariff known as P. S. C., 2 N. Y., No. 614, has been in force for some time on the Boston and Maine Railroad in New York state and elsewhere, covering mixed shipments of sewer pipe, drain tile, clay conduits, fire and paving brick, and cement. The tariff in question is not, so far as we can see, preferential or discriminatory in its character, notwithstanding the fact that it is said to have been prepared chiefly to

## Public Service Commission, Second District

meet the rather special requirements of a concern in Portland, Maine, which manufactures all the various commodities, except cement, that are mentioned in the tariff, and which finds it desirable to include with its shipments of the articles it manufactures a small amount of cement also, so that its customers may, as the result of a single transaction, be placed in the position of being able to make actual use, in structural work, of the tiles, conduits, or other material purchased from the Maine company. Although no limitations upon the amount of cement which might be shipped in a mixed carload of this character was provided in tariff No. 614, it was not supposed by the railroad company that cement shipments under this tariff would ever be made in larger quantities than was necessary to enable purchasers of the other commodities to put their purchases to immediate use in the manner stated. In other words, the inclusion of cement in tariff No. 614 was merely incidental: the tariff was designed primarily to cover the commodities named other than cement.

The petitioners in the present case are all large manufacturers of cement who deal in none of the other commodities mentioned in tariff No. 614. Ordinarily they would have no interest at all in a question of mixed carload rates. Observing, however, that the Boston and Maine straight carload rate on cement was higher by about 25 per cent than the mixed carload rate established by tariff No. 614, and that the tariff in question placed no restriction upon the amount of cement which might be included in a mixed carload, these petitioners commenced some months ago to vary the method they had formerly followed in the shipment of cement to places in New England, and possibly to points in easternmost New York also — although as a matter of fact there seem to have been no actual intrastate shipments made by petitioners under tariff No. 614. But, for New England shipments, petitioners abandoned the use of the railroads at the several points of origin, in Hudson, N. Y., and other places, and inaugurated the practice of loading their product on barges belonging to themselves, at the manufactories, and in this way transporting it to Troy, which is a New York terminus of the Boston and Maine Railroad. At

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Public Service Commission, Second District

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Troy, the cement is now being forwarded over the Boston and Maine Railroad under tariff No. 614 in what are technically mixed shipments, although to all intents and purposes the consignments in question are straight carload shipments of cement only. They are brought under the "mixed carload" designation, and therefore under tariff No. 614, by the simple expedient of including with the cement a nominal amount of one of the other commodities mentioned in tariff No. 614 — purchased by the shippers and included in the shipment for no other purpose than to make what is virtually a straight carload of cement assume the legal character of a mixed carload to which the rates provided by tariff No. 614 would be applicable.

When the Boston and Maine Railroad ascertained that this was being done, it filed with the Commission a new tariff (P. S. C., 2 N. Y., No. 714) designed to take the place of tariff No. 614, and differing from the superseded tariff only in that it limits the amount of cement which may be shipped in mixed loadings to 8,000 pounds. Of course this limitation interferes with the petitioners' ingenious plan of shipping cement in large quantities at the reduced rate established by tariff No. 614, and the present proceeding has been brought to prevent, if possible, the substitution of the new tariff for the old.

We have no desire, of course, to deal with a situation like this in a technical spirit, or otherwise than upon its merits, and if the question of the cement rates on the Boston and Maine Railroad in which the present petitioners are legitimately interested could be settled fairly and comprehensively by an order in the present case, we should be glad to make such an order rather than require the petitioners to bring a new proceeding. But obviously the real question in which the petitioners are interested cannot be fairly settled in the present case. The only cement rate with which under ordinary circumstances the petitioners — who manufacture and sell cement in enormous quantities — are in the least concerned, is the rate on straight carload shipments of the commodity, and *that* rate is not involved, except in the most indirect way, in the present proceeding. Here we are called upon to pass

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Public Service Commission, Second District

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upon the suitability and fairness of mixed carload rates which were never intended to apply to shipments like those made by these petitioners, and which the petitioners themselves very frankly say they would never avail themselves of if the Boston and Maine Railroad's straight carload rates were made reasonably satisfactory to them. It seems undesirable and unnecessary that an important question like this should be settled in such an indirect, not to say devious, manner as here proposed. We think that the petitioners should raise the question of the fairness of the existing rates on straight carload shipments by a direct attack on such rates, and not by an attack upon a tariff in which, but for an unintended loophole in the wording, they would not have been interested at all, and in which their interest will entirely cease as soon as the question of the fairness of the Boston and Maine Railroad's straight carload rates on cement has been satisfactorily adjusted. A proceeding to test these last mentioned rates has already been brought, as we understand it, before the Interstate Commerce Commission, in relation to interstate shipments of cement over the Boston and Maine Railroad; and a similar proceeding as to intrastate rates could with very slight loss of time be instituted here if it were felt that the pending interstate proceeding does not afford petitioners the opportunity they desire to get the entire question settled upon its merits. We feel that an orderly adjudication of the question cannot be reached in the present proceeding, and that it is not our duty, under the circumstances, to prevent the tariff which has been filed with us, limiting the amount of cement which may be included in mixed shipments under the Boston and Maine Railroad's former tariff No. 614 to 8,000 pounds, from taking effect.

All concur.

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Public Service Commission, Second District

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In the Matter of the Complaint of RESIDENTS OF THE INCORPORATED VILLAGE OF UNION, BROOME COUNTY, against BINGHAMTON RAILWAY COMPANY, as to Fares Charged between Union and Binghamton

Case No. 5551

(Public Service Commission, Second District, September 7, 1916)

**Rate of passenger fare between Union and Binghamton, upon what based.**

Certain residents of Union, a village in Broome county, alleged that the passenger rates between that village and the city of Binghamton were unjust and discriminatory because higher than those between the village of Endicott and Binghamton. The tickets from Endicott are workday tickets, not good on Sunday or legal holidays and give no transfer privileges in the city of Binghamton. *Held*, that the conditions as between the two places were not at all similar and no discrimination has been shown. Complaint dismissed.

BY THE COMMISSION.—This is a complaint made by certain residents of the village of Union, Broome county, N. Y., alleging that the fares demanded, charged and collected by the Binghamton Railway Company between the village of Union and the city of Binghamton are unjust, unreasonable and unjustly discriminatory because they are higher than the fares charged by said railway company to certain patrons of its road between the village of Endicott and the city of Binghamton. The complaint was filed with the Commission on May 5, 1916, and was duly answered by the railway company on July 27, 1916. Union is about nine miles west of Binghamton and Endicott is about eight miles west of Binghamton, Endicott being reached by a branch line running from the main line going to Union. A hearing was held in this case at the court house in the city of Binghamton on August 26, 1916, at 10 A. M. at which time the petitioners appeared by Thomas A. MacClary of Union, N. Y., their attorney, and the railway company was represented by its attorney, Mr. Thomas J. Keenan of Curtiss, Keenan & Tuthill, Binghamton, N. Y. At

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Public Service Commission, Second District

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present the railway company charges a round trip fare of twenty-five cents from the village of Union to the city of Binghamton with a transfer either way in the city of Binghamton. The one way fare between these two points is fifteen cents. These fares have been in force for a number of years. The single trip fare is based upon a ten cent fare between the village of Union and the village of Johnson City, formerly Lestershire, and a five cent fare in the city of Binghamton and the round trip fare is based upon a fifteen cent round trip fare between the villages of Union and Johnson City, formerly Lestershire, and a ten cent round trip fare in the city of Binghamton. The single fare and round trip fare between the villages of Union and Johnson City, formerly Lestershire, were fixed by an agreement in the nature of a franchise which was entered into between the Binghamton, Lestershire and Union Railroad Company and the village authorities of Union on April 22, 1895. The Binghamton Railway Company has succeeded to the rights and obligations of the Binghamton, Lestershire and Union Railroad Company set forth in said agreement. On the line from Union to Binghamton the haul is six miles from Union to the city line of Binghamton and three miles in the city of Binghamton. The complainants allege that the railroad company discriminates against them because it makes certain commutation rates to employees of the Endicott-Johnson Company and the International Time Recording Company from Binghamton to Endicott and return. Books of 12 tickets for one dollar are issued by the railway company entitling the holder to ride from Binghamton to Endicott between 5:30 and 8 A. M. and to return to Binghamton between 5 and 6:30 P. M. These tickets are not good upon Sundays or legal holidays and do not give the holder any transfer privileges in the city of Binghamton. The company also sells books of 12 tickets good for use between Johnson City and Endicott on special trains—westbound from Johnson City at 6:25 and 6:30 A. M. and eastbound leaving Endicott at 5 and 6 P. M. These are sold for sixty cents but do not include any transfer privileges in the city of Binghamton. It should be noted that this traffic flows westerly from Binghamton in the morning



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and easterly to Binghamton in the evening, which is the reverse of the direction in which such traffic usually flows. The persons using the tickets first above mentioned, if they were obliged to use the cars of respondent daily to go to other points in the city of Binghamton not reached by the line running from Endicott to Binghamton, would have to pay an additional fare of five cents in either direction. If this were done six days a week, the total amount paid for transportation would be one dollar and sixty cents. The Erie Railroad runs special trains morning and evening between Binghamton and Endicott to accommodate the people employed in the factories at Endicott and charges a five cent fare between the two points. The patrons of the railroad line who travel back and forth daily between Union and Binghamton claim that they should have the same fare as the people working at Endicott but living in Binghamton, and that they are discriminated against by not having it. It appeared at the hearing that most of the witnesses for the complainants worked near the terminus of the line running from Union to Binghamton and did not require any transfer privileges in the city of Binghamton. The regular travel from Union begins shortly after 6 in the morning and lasts until about 8:30 A. M., and in the afternoon it starts from Binghamton sometime after 4 o'clock and lasts until 7 P. M. At most there appears to be about forty patrons of the line at Union who use this railway daily going to and from Binghamton. While the fourth paragraph of complaint alleged that the railway company charged certain of its passengers between Binghamton and Endicott seventy cents per week for six rides each way yet there is no evidence to that effect in the record, nor does the tariff of the railroad company filed with this Commission show such a fare. There was a suggestion made at the hearing that only employees of the Endicott-Johnson Company and the International Time Recording Company at Endicott were permitted to use the special tickets in question which are provided for by the tariff of the railway company. The railway company must, of course, under its tariff sell such tickets to all persons who desire to use them pursuant to the rules and regulations of the railway com-

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pany. It cannot limit their use to the employees of these two factories only. If such a practice has been in vogue heretofore the railway company must discontinue it. We are unable to see where the railway company is discriminating against the patrons of its lines at Union in giving the specific rates herein referred to between Binghamton and Endicott. The regular traffic from Union to Binghamton is easterly in the morning and westerly at night while the regular travel for which special rates are given between Binghamton and Endicott flows westerly in the morning and easterly at night. The conditions are not at all similar. Beyond this the regular traffic between Binghamton and Endicott which gets the benefit of the special rates is many times greater than the regular travel between Union and Binghamton. When considering that the Union passengers receive transfer privileges going and coming in the city of Binghamton, if desired, it is difficult to see wherein the claim of discrimination can be justified. Under all the circumstances, therefore, the Commission is of the opinion that the complainants have failed to substantiate the claim that the fares charged them by the railway company for transportation between the village of Union and the city of Binghamton are unjust, unreasonable and unjustly discriminatory; and it is, therefore

Ordered, That the complaint be and the same hereby is dismissed and the case closed upon the records of this Commission.

# STATE INDUSTRIAL COMMISSION

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In the Matter of the Claim of J. FRANK SAMPSON and NELLIE SAMPSON, for Compensation under the Workmen's Compensation Law, for the Death of HAYES SAMPSON, against THE O'DELL & EDDY COMPANY, Employer; LUMBER MUTUAL CASUALTY INSURANCE COMPANY of New York, Insurance Carrier

Claim No. 63569

(Decided May 5, 1916)

Injuries received by Hayes Sampson, resulting in his death, while employed as a laborer by the O'Dell & Eddy Company.

On January 20, 1915, Hayes Sampson, while employed as a laborer at the lumber mill of the O'Dell & Eddy Company, a corporation at Arcade, N. Y., was, with other laborers, filling a boiling vat with logs, when he accidentally fell into the vat, thereby being severely scalded. At the time of the injury the deceased was suffering with diabetes, which was made acute by the scalding and thereby led to his death on January 30, 1915. His average wage was the sum of one dollar and seventy-five cents per day. An award was made.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

John Knight, attorney for claimants.

J. R. Young, attorney for employer and insurance carrier.

BY THE COMMISSION.— All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award as follows:

On January 28, 1915, the day when Hayes Sampson received the injury which resulted in his death, he resided at Yorkshire, N. Y., and was employed as a common laborer in the lumber mill

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of the O'Dell & Eddy Company, a corporation engaged in the business of operating a lumber mill and the manufacture of last blocks and box shooks, with a plant at Arcade, N. Y., and an office at Chaffee, Erie county, N. Y.

On said date while Hayes Sampson was working for his employer at his employer's plant and was engaged with two other laborers in filling a boiling vat (water) with logs, he accidentally fell into the vat, thereby severely scalding both legs (with the exception of the feet) to above the knees, and his left arm to above the elbow, and he died on January 30, 1915. At the time of this injury Hayes Sampson was suffering with sugar diabetes which was unknown to him or to anyone else, and this condition became acute by reason of the injuries, thereby causing his death.

Hayes Sampson lived with his parents at Yorkshire, N. Y., and was making \$1.75 per day as a laborer in the lumber mill where he had been working since June, 1915. He was accustomed to give his mother an average of \$4 per week towards her support and towards the family fund, and had on various occasions bought cord wood, coal, groceries and pork for the family table and clothes for a younger sister and for his mother, said purchases being made of his own money. His contributions to his mother in money were used for the purpose of paying grocery bills. Nellie Sampson, the mother of Hayes Sampson, was partially dependent upon Hayes Sampson for support at the time of the accident to Hayes Sampson. J. Frank Sampson was the father of Hayes Sampson and at the time of the accident was about fifty-six years of age. He was employed as a mail clerk on a railroad at a salary of \$1,300 per year. Owing to sickness which appeared regularly every year in the form of hay fever and asthma he lost sufficient time to reduce his earnings to between \$900 and \$1,000 per year as a regular thing. He owned the house he lived in which was worth about \$2,500. There was a mortgage on the same to the amount of \$1,200 and he had debts in the amount of \$1,304 outside of the said mortgage. J. Frank Sampson was not dependent upon Hayes Sampson at the time of the accident to Hayes Sampson.

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The average weekly wage of Hayes Sampson was the sum of ten dollars and ten cents.

Due notice of accidental injury was given to the employer. Notice of death was given to the employer more than thirty days after the death of Hayes Sampson, namely, on March 4, 1915, but the failure to give notice of death to the employer has not prejudiced the employer.

Award of compensation is hereby made against the O'Dell & Eddy Company, employer, and Lumber Mutual Casualty Insurance Company, insurance carrier, to Nellie Sampson, dependent mother of Hayes Sampson, deceased employee, at the rate of \$1.51 weekly during dependency; and to W. S. Davis, undertaker, in the sum of \$100 for the funeral expenses of Hayes Sampson, deceased.

The claim of J. Frank Sampson against the O'Dell & Eddy Company, employer, and Lumber Mutual Casualty Insurance Company of New York, insurance carrier, is hereby denied on the ground that J. Frank Sampson was not dependent upon Hayes Sampson at the time of the accident which resulted in the death of Hayes Sampson.

The claim made by J. Frank Sampson, being based upon his obligation to support Nellie Sampson who in turn was partially supported by Hayes Sampson, is hereby declared to be a claim for compensation made by Nellie Sampson through J. Frank Sampson, her agent.

The failure of the claimants herein to give the employer a notice of the death of Hayes Sampson within thirty days from the death of Hayes Sampson is hereby excused on the ground that such failure has not prejudiced the employer.

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In the Matter of the Claim of FRANK J. LINDSAY, for Compensation Under the Workmen's Compensation Law, against JAMES GALLAGHER, Employer; LONDON GUARANTEE AND ACCIDENT COMPANY, LTD., Insurance Carrier

Claim No. 45131

(Decided May 18, 1916)

Injuries received by Frank J. Lindsay while employed as a teamster by James Gallagher at Forestport, N. Y.

On November 15, 1915, Frank J. Lindsay, while employed at Forestport, N. Y., by James Gallagher in the lumbering business, was asleep at the lumber camp of his employer and was awakened by noises in the horse barn. He put his shoes on without lacing and went to the barn and while returning tripped over one of his loose shoe laces and fell against an axe severing an artery. Shortly after the accident, while going to the office of his physician he fell on the ice and reopened the cut which became infected and blood poisoning set in. An operation was necessary but was not successful and he has lost the use of the left hand. His average weekly wage was the sum of eleven dollars and twenty-eight cents. An award was made.

Robert W. Bonyng, Chief Counsel to State Industrial Commission.

William Butler, attorney for employer and insurance carrier.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award as follows:

On November 15, 1915, the day when Frank J. Lindsay received his injuries, he resided at Forestport, N. Y., and was employed as a teamster by James Gallagher who was engaged in the business of lumbering at Forestport, N. Y. Frank J. Lindsay lived at the logging camp in the woods.

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On said date while Frank J. Lindsay was asleep at the said camp and at about midnight he heard a noise among the horses in the barn near the camp and went out to see what was the matter. He put on his shoes without lacing them and while returning from the barn he tripped over one of his loose shoe laces, and fell against an axe which was lying on the ground, thereby receiving an incised wound about two and one-half inches long in the left forearm about four inches above the wrist, severing the radial artery and producing a severe hemorrhage. The next day Frank J. Lindsay left the camp and went to reside with his uncle at Forestport, N. Y., and could work no more by reason of his said injuries. He went to his uncle's house to be near a doctor. About eight days after the said accident while he was leaving the house to go to the doctor's office, he slipped on some ice on the steps of the house and fell on his left wrist which up to that time had been making a satisfactory recovery; but the fall on his wrist reopened the wound and thereafter the wound became infected and blood poisoning set in, involving the whole forearm and hand and a sloughing off of the tendons commenced. An operation was performed for the purpose of removing the diseased tendons and of lengthening the remaining portion of the tendons so that some use of the hand could be restored, but the operation was unsuccessful and Lindsay did not succeed in recovering the power to flex the tendons of that hand and has permanently lost the use of the left hand.

The average weekly wage of Frank J. Lindsay was the sum of eleven dollars and twenty-eight cents.

Award of compensation is hereby made against James Gallagher, employer, and London Guarantee and Accident Company, Limited, insurance carrier, to Frank J. Lindsay, injured employee, at the rate of seven dollars and fifty-two cents weekly for a period of 244 weeks from November 15, 1915, for the equivalent of the loss of the left hand.

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**In the Matter of the Claim of NAZZARENO TESTA, for Compensation Under the Workmen's Compensation Law, against W. J. BURNS COMPANY, Employer; LONDON AND LANCASHIRE INDEMNITY COMPANY OF AMERICA, Insurance Carrier**

**Claim No. 16721**

**(Decided May 18, 1916)**

**Injuries received by Nazzareno Testa while employed as a laborer by W. J. Burns Company at Syracuse, N. Y.**

On September 23, 1915, while Nazzareno Testa was employed as a laborer by W. J. Burns Company at Syracuse, N. Y., he was engaged with other men in lifting a concrete form from the concrete, when some of the men let the other end of the form drop. The form struck him in the groin, inflicting a small wound; subsequently a tubercular infection resulted from the wound, disabling him from working from the date of the accident to May 11, 1916, and on that date he was still disabled. His average weekly wage was the sum of thirteen dollars and eighty-five cents. An award was made.

**Robert W. Bonynge, Chief Counsel to State Industrial Commission.**

**Hitchcock & Murphy, attorneys for employer and insurance carrier.**

**William J. McClusky, attorney for claimant.**

**BY THE COMMISSION.**—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award, as follows:

On September 23, 1915, the day when Nazzareno Testa received his injuries, he resided at 506 Burnett avenue, Syracuse, N. Y., and was employed as a laborer by W. J. Burns Company who were engaged in the general contracting business, with an office at Syracuse, N. Y. At the time of the accident W. J.



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Burns Company were performing some construction work on West Marcellus street, Syracuse, N. Y., and Nazzareno Testa was employed as a laborer on that job.

On said date while Testa was working for his employer at the said place where some construction work was being done, he and some fellow laborers were engaged in lifting a concrete form from the concrete work and the men at the opposite end of the form came in contact with a pile of crushed stone and let the end of the form drop. Testa with other men tried to hold the form and it struck him in the right groin, and he received a small punctured wound in the groin from the nail which was on the end of the wooden form. He worked three or four days after the accident and then was laid up and was sick and unable to work any more. On October eighth a doctor was called in and he found Testa with swollen glands in the right groin. Testa had received a tubercular infection from the nail, which infection had spread, involving his right hip and thigh. Testa was thereby disabled from working from the date of the accident to May 11, 1916, a period of thirty-three weeks, and on that date was still disabled.

The average weekly wage of Nazzareno Testa was the sum of thirteen dollars and eighty-five cents.

Nazzareno Testa failed to give written notice of his injury to his employer within ten days of the said accident but his failure to do so has not prejudiced the employer.

Award of compensation is hereby made against W. J. Burns Company, employer, and London and Lancashire Indemnity Company of America, insurance carrier, to Nazzareno Testa, injured employee, at the rate of nine dollars and twenty-three cents weekly for a period of thirty-one weeks from October 7, 1915 to May 11, 1916; and this claim is hereby continued for further hearing; and William J. McClusky, attorney for claimant, is hereby allowed the sum of fifty dollars for his legal services herein, said sum to be a lien against the amount due for compensation hereunder.

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In the Matter of the Claim of MARY GARTNER and Minor Children, for Compensation Under the Workmen's Compensation Law for the Death of HERMAN GARTNER, against NEW YORK DAIRY PRODUCE COMPANY, Employer; LONDON AND LANCA-SHIRE INDEMNITY COMPANY, Insurance Carrier

Claim No. 818

(Decided May 23, 1916)

Injuries received by Herman Gartner, resulting in his death, while employed by New York Dairy Produce Company as a driver of a milk wagon.

On February 5, 1916, Herman Gartner, while employed as a driver of a milk wagon by New York Dairy Produce Company, a corporation, in the borough of Brooklyn, city of New York, was delivering milk in Long Island City, when he slipped on the pavement while handling a thirty-quart milk can, resulting in an old hernia becoming strangulated. An operation was performed, but peritonitis set in and he died the following month. His average weekly wage was the sum of fifteen dollars. An award was made.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

Wing & Wing, attorneys for employer and insurance carrier.

By THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award, as follows:

On February 8, 1916, the day when Herman Gartner received the injuries which resulted in his death, he resided at 31 Purvis street, Long Island City, and was employed as a driver of a milk wagon by New York Dairy Produce Company, a corporation engaged in the business of selling dairy products, with a place of business at 588 Oakland street, borough of Brooklyn, city of New York.

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On said date while Herman Gartner was driving his employer's wagon and was engaged in making a delivery of a thirty-quart milk can from the wagon to a customer at East avenue and Seventh street, Long Island City, he slipped on the pavement and thereby received a strain in his left groin. He continued working until February 26, 1916, at which time he reported to his employer that he had a hernia and had to go to the hospital to be operated upon. He went to the hospital and it was found that he had a hernia of long standing which had become aggravated and strangulated by the strain and he was operated upon, and after the operation a general peritonitis set in consequent upon the inflammation caused by the hernia. He was operated upon a second time a few days later but the operation was not successful and he died of peritonitis on March 6, 1916.

The average weekly wage of Herman Gartner was the sum of thirteen dollars and two cents.

Herman Gartner left him surviving his widow, Mary Gartner, aged twenty-six years, his daughter, Rose Anna Gartner, aged two years, and his daughter, Florence Gartner, aged one year, the claimants herein, and no other child or children under the age of eighteen years.

Award of compensation is hereby made against New York Dairy Produce Company, employer, and London and Lancashire Indemnity Company, insurance carrier, to the widow and children of Herman Gartner, deceased employee, as follows: to Mary Gartner, widow, aged twenty-six years, at the rate of four dollars and fifty cents weekly during widowhood, with two years' compensation in one sum upon remarriage; and to Rose Anna Gartner, daughter, aged two years; and to Florence Gartner, daughter, aged one year, at the rate of one dollar and fifty cents each, weekly, until they shall respectively arrive at the age of eighteen years; and to Mary Gartner in the sum of one hundred dollars on account of the money expended by her in the matter of the funeral and burial of Herman Gartner, deceased.

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In the Matter of the Claim of MILDRED DODD, Widow, for Compensation Under the Workmen's Compensation Law, for the Death of JAMES H. DODD, JR., against LANCASHIRE CORPORATION, Employer; ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE CORPORATION, Insurance Carrier

Claim No. 772

(Decided May 23, 1916)

Injuries received by James H. Dodd, Jr., resulting in his death, while employed as a general repairman and engineer by Lancashire Corporation.

On February 1, 1916, James H. Dodd, Jr., while employed as an engineer and general repairman by Lancashire Corporation, a corporation in the borough of Manhattan, city of New York, was called upon to open an apartment window which had become set by reason of the drying of a new coat of paint; he opened the window and the window suddenly fell upon him and knocked him out on the street, causing severe fractures, resulting in his death from pneumonia on February 7, 1916. His average weekly wage was the sum of twenty-three dollars and eight cents. Award denied.

Robert W. Bonyng, Chief Counsel to State Industrial Commission.

Jeremiah F. Connor, attorney for employer and insurance carrier.

Wise & Ottenberg, attorneys for claimant.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and decision, as follows:

On February 1, 1916, the day when James H. Dodd, Jr., received his injuries which resulted in his death, he resided at 353 West Eighty-fifth street, borough of Manhattan, city of New York. He was the engineer in charge of an apartment house at that address and his duties were to take care of elevators, machinery and pumps, and to operate the boilers and to do the

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repair to the electric light equipment, and also to act as handy man about the place.

On said date while James H. Dodd, Jr., was working for his employer at the said premises he was called upon by a tenant of the second story front apartment to open a window which had been stuck by reason of having been recently painted and by reason of the drying of the paint. He succeeded in opening the window and the window suddenly fell upon him and knocked him out on to the street, causing a fracture of the left femur and a compound fracture of the mandible, and was taken to the hospital where in consequence of his injuries he developed lobar pneumonia and died on February 7, 1916.

The average weekly wage of James H. Dodd, Jr., was the sum of twenty-three dollars and eight cents.

The claim of Mildred Dodd against Lancashire Corporation, employer, and Zurich General Accident and Liability Insurance Company, insurance carrier, for compensation for the death of James H. Dodd, Jr., deceased employee, is hereby denied on the ground that James H. Dodd, Jr., did not come to his death by reason of any accidental injury arising out of and in the course of any employment designated to be hazardous in section 2 of the Workmen's Compensation Law.

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In the Matter of the Claim of **RAYMOND DALE**, for Compensation Under the Workmen's Compensation Law, against **HUAL CONSTRUCTION COMPANY**, Employer; **CASUALTY COMPANY OF AMERICA**, Insurance Carrier

Claim No. 17305

(Decided May 24, 1916)

Injuries received by Raymond Dale while in the general employ of Seamon Lippert as a driver of a wagon, and under an arrangement between his employer and the Hual Construction Company to haul sand for and under the direction of the construction company.

On December 13, 1915, Raymond Dale, while in the general employ of Seamon Lippert, as a wagon driver, was under an arrangement between

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Lippert and certain subcontractors of the said construction company, leased out together with his team to the corporation. The president of the corporation was one Huntley and the foreman was one McGorry; these two had also a partnership known as Huntley & McGorry, who had taken on a contract with the Hual Construction Company to furnish teams for hauling sand. Not having sufficient teams, they secured, under an agreement, teams from one Garrity. Garrity secured one of Lippert's teams, of which team the said Raymond Dale was the driver, but while at work Dale was under the control and direction of the Hual Construction Company. While so employed Dale was returning from where he had unloaded the dirt, and was driving along a highway in Buffalo when his horses ran away, throwing him from the wagon and inflicting severe injuries. His average weekly wage was the sum of eleven dollars and fifty-four cents. An award was made.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

R. T. Summers, attorney for Seamon Lippert and Barney Lippert.

Chauncey J. Hamlin, attorney for claimant.

F. S. Anderson, attorney for Hual Construction Company.

F. B. Griffith, attorney for Huntley & McGorry.

Thomas R. Guy, attorney for insurance carrier.

By THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award as follows:

On November 13, 1915, the day when Raymond Dale received his injuries, he resided at 383 Riley street, Buffalo, N. Y., and was in the general employ of Seamon Lippert as a driver of a wagon. His wages were one dollar per day and board and lodging, the equivalent of twelve dollars per week. Hual Construction Company, a domestic corporation, was engaged in some construction work in Buffalo at Genesee and Doat streets, Buffalo,

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N. Y., and required teams for the hauling of sand. The president of the corporation was Walter H. Huntley and one of the foremen was one McGorry. Huntley and McGorry had a partnership under the firm name of Huntley & McGorry whose business was the furnishing of teams for hauling, and they had a contract with the Hual Construction Company to furnish to that company the teams for the hauling of sand at six dollars a day per team. As they did not have enough teams, they secured additional teams of one Garrity, also in the teaming business in Buffalo, N. Y., for which Garrity received from Huntley & McGorry six dollars a day per team. As Garrity did not have enough teams, he secured additional teams of Seamon Lippert, for which Lippert received from Garrity six dollars a day per team, and Raymond Dale was the driver of one of the last mentioned teams. At all times during the day while hauling sand, Dale was under the control and direction of one Clockenberg, a foreman of the Hual Construction Company, but said foreman had no authority to discharge Raymond Dale. Raymond Dale was in the special employ of Hual Construction Company on said date.

On said date while Raymond Dale was working for his employer, and after he had taken some dirt from the construction work to a dump and there deposited the same, and while he was returning to the place of said construction work and driving along a public street in the city of Buffalo, his horses became frightened at a passing train and ran away, and Raymond Dale was thereby thrown from his wagon, thereby receiving lacerations of the scalp, a compound dislocation of the right ankle and extensive lacerations of the dorsum of the right foot and a rupture of two tendons of that foot, by reason of which injuries Raymond Dale was disabled for a period of twenty-four weeks, namely, from the date of the accident to April 29, 1916, and on that date was still disabled.

The average weekly wage of Raymond Dale was the sum of eleven dollars and fifty-four cents.

Award of compensation is hereby made against Hual Construction Company, employer, and Casualty Company of America,

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insurance carrier, to Raymond Dale, injured employee, at the rate of seven dollars and sixty-nine cents weekly for a period of twenty-two weeks from November 27, 1915, to April 29, 1916, and this claim is hereby continued for further hearing.

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In the Matter of the Claim of ABRAHAM DAYS, for Compensation under the Workmen's Compensation Law, against S. TRIMMER & SONS, INC., Employer; ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier

Claim No. 28367

(Decided May 25, 1916)

Injuries received by Abraham Days while employed as a driver's helper by S. Trimmer & Sons, Inc., a corporation engaged in selling coal at retail.

On February 15, 1916, Abraham Days, while employed by S. Trimmer & Sons, Inc., as a driver's helper in delivering coal by wagon, was putting coal into a cellar, when all the fingers of both of his hands and all of his toes of both feet became frost-bitten. Ulcers developed and parts of his fingers were amputated. His average weekly wage was the sum of eleven dollars and fifty-four cents. An award was made.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

T. C. Jones, attorney for insurance carrier.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award as follows:

On February 15, 1916, the day when Abraham Days received his injuries, he resided at 41 East One Hundred and Thirty-third street, borough of Manhattan, city of New York, and was employed as a driver's helper by S. Trimmer & Sons, Inc., a corporation engaged in the business of selling coal at retail and delivering the same by means of wagons.



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On said date while Abraham Days was working for his employer and was engaged in delivering coal into a cellar at No. 2925 Third avenue, borough of Manhattan, city of New York, all the fingers of both of his hands and all the toes of both feet became frost bitten. The day was an unusually cold day with a range of temperature of from two degrees to twenty-eight degrees Fahrenheit and was the second coldest day of the month of February, 1916. Abraham Days started to work at about 6.30 that morning and quit work at 2.30 P. M., and went back to the stable with the team and helped to unhitch the same as best he could, and then went home and secured the services of a doctor. The coal which he was handling was wet and he had on only a pair of ten-cent gloves to protect his hands. Ulcers developed on the third and fourth fingers of his left hand and the third and fourth fingers of the right hand, and the first and second phalanges of his right index and second fingers were amputated. By reason of the injuries to the third and fourth fingers of the left hand and the third and fourth fingers of the right hand, Abraham Days would have been disabled from working for a period of twelve weeks from the date of the accident, irrespective of the injuries to and amputation of the two phalanges of the first and second fingers of the right hand.

The average weekly wage of Abraham Days was the sum of eleven dollars and fifty-four cents.

Award of compensation is hereby made against S. Trimmer & Sons, Inc., employer, and Ætna Life Insurance Company, insurance carrier, to Abraham Days, injured employee, at the rate of seven dollars and sixty-nine cents weekly for a period of ten weeks from February 29, 1916, to May 8, 1916, for the disability occasioned by the injuries to the third and fourth fingers of the right and left hands, and for the further and subsequent period of forty-six weeks for the loss of the right index finger, and for the further and subsequent period of thirty weeks for the loss of the right second finger.

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In the Matter of the Claim of JOHN FORSEY, for Compensation under the Workmen's Compensation Law, against SIKES CHAIR COMPANY, Employer; AMERICAN MUTUAL COMPENSATION INSURANCE COMPANY, Insurance Carrier

Claim No. 16679

(Decided May 26, 1916)

Injuries received by John Forsey while employed as a stationary engineer by Sikes Chair Company at Buffalo, N. Y.

On January 18, 1916, John Forsey, while employed as a stationary engineer by the Sikes Chair Company, a corporation engaged in manufacturing chairs in the city of Buffalo, N. Y., was at work on a stationary engine, when his right hand was caught in the drive wheel of the engine, resulting in the loss of the index finger of the right hand. His average weekly wage was the sum of fourteen dollars and fifty-nine cents. An award was made.

Robert W. Bonyng, Chief Counsel to State Industrial Commission.

Jeremiah F. Connor, attorney for employer and insurance carrier.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award, as follows:

On January 18, 1916, the day when John Forsey received his injuries, he resided at 539 Perry street, Buffalo, N. Y., and was employed as a stationary engineer by Sikes Chair Company which company was engaged in the business of manufacturing chairs, with a plant and place of business at 500 Clinton street, Buffalo, N. Y.

On said date while John Forsey was working for his employer at his employer's plant and while he was working on a stationary engine, he accidentally caught the first finger of his right hand in the drive wheel of the engine, causing lacerations of the index finger of the right hand and a fracture thereof, resulting in a

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permanent stiffness and ankylosis of the first joint of that finger and the consequent loss of use thereof.

The average weekly wage of John Forsey was the sum of fourteen dollars and fifty-nine cents.

Award of compensation is hereby made against Sikes Chair Company, employer, and American Mutual Compensation Insurance Company, insurance carrier, to John Forsey, injured employee, at the rate of eleven dollars and fifty-four cents weekly for a period of twenty-three weeks for the equivalent of the loss of one-half the index finger of his right hand.

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In the Matter of the Claim of CHARLES BLAES, for Compensation under the Workmen's Compensation Law, against E. W. BLISS COMPANY, Employer; ETNA LIFE INSURANCE COMPANY, Insurance Carrier

Claim No. 28115

(Decided May 26, 1916)

Injuries received by Charles Blaes while employed as a grinder by the E. W. Bliss Company, a corporation engaged in manufacturing machinery.

On October 18, 1915, Charles Blaes, while employed by the E. W. Bliss Company, a corporation manufacturing machinery in the city of New York, was grinding on an emery wheel, when particles of emery were thrown into his eye, causing the permanent loss of the use of the same. He is now entirely blind in the right eye and has one-twentieth of normal vision in his left eye. The loss of the vision of the right eye, however, is not due to this accident. His average weekly wage was the sum of fourteen dollars and forty-two cents. An award was made.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

T. C. Jones, attorney for insurance carrier.

Edgar F. Hazleton, attorney for claimant.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commis-

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sion makes its conclusions of fact, ruling of law, award and decision as follows:

On October 18, 1915, the day when Charles Blaes received his injuries, he resided at 9 John street, Hidgewood, N. Y., and was employed as a grinder by E. W. Bliss Company, a corporation engaged in the business of manufacturing machinery with a plant and place of business at Fifty-third street and First avenue, borough of Brooklyn, city of New York.

On said date while Charles Blaes was working for his employer at his employer's plant and was engaged in grinding some "cutters" on an emery wheel, particles of emery were thrown into his eye, causing an injury to the left eye which has resulted in the permanent loss of use of same. Before the said accident Blaes was suffering from a keratitis and from a chorio-retinitis and optic atrophy. At the date hereof Blaes is entirely blind in his right eye and has one-twentieth of normal vision in his left eye. The loss of vision of the right eye, however, is not due to the injury which resulted from the said accident but is due to changes in the back ground of that eye disassociated with said accident. The previous defective condition of the left eye was aggravated by the said accident and its present permanent defect is due to the said accident.

The average weekly wage of Charles Blaes was the sum of fourteen dollars and forty-two cents.

Award of compensation is hereby made against E. W. Bliss Company, employer, and Ætna Life Insurance Company, insurance carrier, to Charles Blaes, injured employee, at the rate of nine dollars and sixty-one cents weekly for a period of 128 weeks from October 18, 1915, for the equivalent of the loss of the left eye.

The claim of Charles Blaes against E. W. Bliss Company, employer, and Ætna Life Insurance Company, insurance carrier, for compensation for alleged injury to his right eye is hereby denied on the ground that the defect in the said eye was not due to any accident received in the course of his employment and arising out of his employment.

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In the Matter of the Claim of BESSIE PEAKE and Minor Child,  
for Compensation under the Workmen's Compensation Law,  
for the Death of IRVING PEAKE, against FRED. W. LAKIN,  
Employer; GLOBE INDEMNITY COMPANY, Insurance Carrier

Claim No. 13035

(Decided May 31, 1916)

Injuries received by Irving Peake, resulting in his death, while employed as a lumberman by Fred. W. Lakin.

On June 19, 1915, while Irving Peake was employed as a lumberman by Fred W. Lakin, he was cutting timber, when a tree fell upon him and killed him. His average weekly wage was the sum of fourteen dollars and forty-two cents. An award was made.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

Robert M. McCormack, attorney for employer and insurance carrier.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award as follows:

On June 19, 1915, the day when Irving Peake received the injuries which resulted in his death, he resided at Hancock, N. Y., and was employed as a lumberman by Fred. W. Lakin of Hancock, N. Y. On or about the 12th day of June, 1915, Fred. W. Lakin desired to have some hemlock timber cut and the bark peeled on what is known as the Crow Lot, in the town of Hancock, N. Y., which lot belonged to Lakin. He offered Irving Peake and Henry L. Buddenhagen four dollars and fifty cents a ton to cut the timber, peel the bark and haul and deliver the bark on board cars at Tunnel, N. Y. Peake and Buddenhagen were of the opinion that the price was too small and Lakin thereupon employed one James

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Mallory to do the work for five dollars a ton. Mallory was expected to take on whatever assistance he needed. Mallory had Peake and Buddenhagen assist him on the job so far as the cutting of the timber and peeling of the bark went, for which two dollars out of the said five dollars was to be divided equally between Mallory, Peake and Buddenhagen. The hauling of the bark to the cars was to be done by Mallory and the balance of three dollars went to him for that service. Mallory furnished all the equipment for doing the work. Lakin paid to Mallory five dollars per ton for bark delivered on the cars. As between Mallory, Peake and Buddenhagen, no one was boss. The three men started work on June 14, 1915, and continued together until Peake was killed.

On said date while Irving Peake was working on the said tract of land cutting timber, a tree which had been cut through at the base slipped from the stump and fell upon Irving Peake and crushed his chest so severely that he died a few minutes after the accident.

The average weekly wage of Irving Peake was the sum of fourteen dollars and forty-two cents.

Irving Peake left him surviving his widow, Bessie Peake, aged thirty-nine years, and his son, Cecil Peake, aged fourteen years, the claimants herein, and no other child or children under the age of eighteen years.

Award of compensation is hereby made against Fred. W. Lakin, employer, and Globe Indemnity Company, insurance carrier, to the widow and minor child of Irving Peake, deceased employee, as follows: to Bessie Peake, widow, aged thirty-nine years, at the rate of four dollars and thirty-four cents weekly during widowhood, with two years' compensation in one sum upon remarriage; and to Cecil Peake, son, aged fourteen years, at the rate of one dollar and forty-four cents weekly until he shall arrive at the age of eighteen years, said payments to begin as of the date of death, June 19, 1915; and to Bessie Peake for the expenses of the funeral and burial of Irving Peake, deceased employee, which were paid by her, the sum of seventy-five dollars.

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In the Matter of the Claim of CATHERINE ABBONATO and Minor Children, for Compensation under the Workmen's Compensation Law, for the death of FELICE ABBONATO, against E. GREENFIELD'S SONS, Employer; OCEAN ACCIDENT AND GUARANTEE CORPORATION, Ltd., Insurance Carrier

Claim No. 734

(Decided May 31, 1916)

Injuries received by Felice Abbonato, resulting in his death, while employed as a helper in a candy factory by E. Greenfield's Sons.

On January 18, 1916, while Felice Abbonato was employed as helper on a candy pulling machine by E. Greenfield's Sons, a corporation engaged in the business of manufacturing candy in the borough of Brooklyn, city of New York, and was feeding candy into the machine, when one of the machine arms caught him in the abdomen and lifted him up to the machine, inflicting injuries to his kidney, resulting in abscesses forming, and requiring an operation and in his subsequent death. His average weekly wage was the sum of seven dollars and sixty-nine cents. An award was made.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

Norman C. Hewett, attorney for employer and insurance carrier

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award as follows:

On January 18, 1916, the day when Felice Abbonato received the injury which resulted in his death, he resided at 177 Mentrose avenue, borough of Brooklyn, city of New York, and was employed as a helper on a candy-pulling machine by E. Greenfield's Sons, a corporation engaged in the business of manufacturing candy, with an office at 200 Fifth avenue, borough of Man-

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hattan, city of New York, and with a plant at 95 Lorimer street, borough of Brooklyn, city of New York.

On said date while Felice Abbonato was working for his employer at his employer's plant, and was engaged in feeding candy on to a candy-pulling machine, one of the arms of the machine caught Abbonato in the abdomen and lifted him up on to the machine. A fellow workman grasped Abbonato by both legs and pulled him off the machine and Abbonato fell backwards against a nearby door, whereby Abbonato received scratches on his shoulders and back and also injuries to his abdomen. The impact of the arm of the machine against his abdomen caused an injury to his kidney, resulting in a perinephritic abscess which required surgical interference. Abbonato did not recover from the operation and died of a general peritonitis which resulted from the said abscess. His death occurred on February 13, 1916.

The average weekly wage of Felice Abbonato was the sum of seven dollars and sixty-nine cents.

Felice Abbonato left him surviving, his widow, Catherine Abbonato, aged forty-nine years, his son Alfio Abbonato, aged seventeen years, his son, Giuseppe Abbonato, aged fifteen years, and his son, Giovanni Abbonato, aged eleven years, the claimants herein, and no other child or children under the age of eighteen years.

Award of compensation is hereby made against E. Greenfield's Sons, employer, and Ocean Accident and Guarantee Corporation, Ltd., insurance carrier, to the widow and minor children of Felice Abbonato, deceased employee, as follows: to Catherine Abbonato, widow, aged forty-nine years, at the rate of two dollars and thirty-one cents weekly during widowhood, with two years' compensation in one lump sum upon remarriage; and to Alfio Abbonato, son, aged seventeen years, Giuseppe Abbonato, son, aged fifteen years, and Giovanni Abbonato, son, aged eleven years at the rate of seventy-seven cents weekly each, until they shall respectively arrive at the age of eighteen years; and to Charles Bentvegna in the sum of one hundred dollars on account of the funeral expenses in the matter of the burial of Felice Abbonato, deceased.



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In the Matter of the Claim of LEE HADDEN, for Compensation under the Workmen's Compensation Law, against E. L. STANTON, Employer; GLOBE INDEMNITY COMPANY, Insurance Carrier

Claim No. 16617

(Decided June 5, 1916)

Injuries received by Lee Hadden, while employed as a carpenter by E. L. Stanton.

On February 1, 1916, Lee Hadden, while employed as a carpenter by E. L. Stanton, was at work on a building contract at Maine, N. Y., and while driving a nail the head of the nail flew and struck him in the right eye, causing permanent loss of vision of that eye and subsequently permanent loss of its use. His average weekly wage was the sum of fourteen dollars and forty-two cents. An award was made.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

Robert M. McCormick, attorney for employer and insurance carrier.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award as follows:

On February 1, 1916, the day when Lee Hadden received his injuries, he resided at Union, N. Y., and was employed as a carpenter by E. L. Stanton who was engaged in the carpentry business with an office at Endicott, N. Y. A few days prior to said date Kinney Bros. of Maine, N. Y., made a contract with the Endicott Lumber and Box Company, carpenter contractors and builders of Endicott, N. Y., to furnish the material and do the labor in ceiling a creamery at their milk plant at Maine, N. Y. The Endicott Lumber and Box Company furnished the material, but not having sufficient men to do the work, engaged E. L.

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Stanton, a carpenter contractor at Endicott, N. Y., to do the labor on the job, agreeing to pay him three dollars and fifty cents per day for his own services and three dollars and fifty cents per day for each man that he should take into his employ to assist on the work. Stanton did not have sufficient men in his own employ to do the work so he obtained from Henry Hill & Son the loan of two men, namely, Lee Hadden, the claimant herein, and Frank Zhe. Stanton paid his men two dollars and a half per day but the payment to Lee Hadden and Frank Zhe was made to Henry Hill & Son, who in turn paid Hadden and Zhe the same amount. Stanton made a profit of one dollar per day each on the work of Hadden and Zhe, the same as he did on his other employees. Lee Hadden was in special employ of E. L. Stanton while doing the above mentioned work.

On said date while Lee Hadden was working for E. L. Stanton on the said construction job at the plant of Kinney Bros. at Maine, N. Y., and while engaged in driving a nail into a piece of wood, the head of the nail flew off and struck him in the right eye, perforating the lower section of the corner below the pupil and penetrating the lens, causing thereby a traumatic cataract and a permanent loss of vision of that eye and a subsequent permanent loss of use thereof.

The average weekly wage of Lee Hadden was the sum of fourteen dollars and forty-two cents.

Award of compensation is hereby made against E. L. Stanton, employer, and Globe Indemnity Company, insurance carrier, to Lee Hadden, injured employee, at the rate of nine dollars and sixty-one cents weekly for a period of 128 weeks from February 21, 1916, for the equivalent of the loss of the right eye.

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In the Matter of the Claim of META A. TIRRE, Mother, for Compensation under the Workmen's Compensation Law, for the Death of AUGUST TIRRE, against BUSH TERMINAL COMPANY, Employer and Self-Insurer

Claim No. 575

(Decided June 5, 1916)

Injuries received by August Tirre, resulting in his death, while employed as a floatman by the Bush Terminal Company.

On July 24, 1915, while August Tirre was employed as a floatman by the Bush Terminal Company, a corporation operating a railroad and water terminal in the borough of Brooklyn, and about midnight of that day was at work on pier No. 1, for his employer, he was ordered to go aboard float No. 6, lying in the slip, and to take his lantern, as it was then about midnight. A little later his lantern was found aboard the float, and his body was recovered from the water where he had been drowned. His average weekly wage was the sum of fourteen dollars. An award was made.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

Cullen & Dykman, attorneys for employer.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its amended conclusions of fact, ruling of law, and award as follows:

On July 24, 1915, the day when August Tirre received the injuries which resulted in his death, he resided at 734 Columbus avenue, borough of Manhattan, city of New York, and was employed as a floatman by Bush Terminal Company, a corporation engaged in the operation of a railroad and water terminal in the borough of Brooklyn, city of New York, and in connection therewith, of docks and floats.

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On said date at about midnight, August Tirre was working for his employer on the dock, or pier No. 1, and was told by his boss to take his lantern and to go aboard float No. 6 which was lying in the slip. He did so, and at about 12:30 A. M. he could not be found, and his lantern was found aboard the float No. 6. His body was later recovered from the water where he had been drowned.

The average weekly wage of August Tirre was the sum of fourteen dollars.

August Tirre left him surviving and dependent upon him for support at the time of his death, his mother, Meta A. Tirre, aged seventy-one years, the claimant herein, and no widow or child or children. At the time of the accident resulting in the death of August Tirre, August Tirre was contributing to the support of his mother the sum of three dollars a week and the said mother had no other means of support except the sum of about three dollars per month from the German government and such small additional sums as could be earned by another son who was residing with her in Germany, and who was a sufferer from epilepsy and was able to make only an occasional twenty-cent piece.

Due notice of death was given to the employer.

Award of compensation is hereby made to Meta A. Tirre, mother, aged seventy-one years, against Bush Terminal Company, at the rate of two dollars and ten cents weekly during dependency; and to Euber Staak in the sum of one hundred dollars on account of the money expended by him for the funeral expenses of August Tirre, deceased.

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**In the Matter of the Claim of LUIGI PANELLA for Compensation,  
under the Workmen's Compensation Law, against NEW YORK  
CENTRAL RAILROAD COMPANY, Employer and Self-Insurer**

Claim No. 34041

(Decided June 6, 1916)

**Injuries received by Luigi Panella while employed as a track laborer by the  
New York Central Railroad Company.**

On January 19, 1916, Luigi Panella was at work at High Bridge, N. Y., for the New York Central Railroad Company and, while he and a fellow workman were removing spikes from the track of his employer, a piece of metal flew into Panella's left eye, causing him loss of time of eighteen weeks. His average weekly wage was the sum of ten dollars and thirty-eight cents. An award was made.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

O. G. Brown, attorney for employer.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award, as follows:

On January 19, 1916, the day when Luigi Panella received his injuries, he resided at High Bridge, N. Y., and was employed as a track laborer by New York Central Railroad Company, a corporation engaged in the operation of a railroad as a common carrier between points within the State of New York and also between points within the State of New York and points in other States.

On said date while Luigi Panella was working for his employer on the main line tracks (used in both interstate and intrastate commerce) at High Bridge Station, N. Y., and while he and a fellow workman were engaged in removing a spike from the said

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track with a claw bar, the fellow workman struck the claw bar with a hammer in order to drive the claw bar under the spike, and a piece of steel flew from either the claw bar or the hammer into the left eye of Luigi Panella, causing an injury to that eye which disabled Luigi Panella from working from the date of the accident until June 6, 1916, a period of eighteen weeks, and on that date he was still disabled.

The average weekly wage of Luigi Panella was the sum of ten dollars and thirty-eight cents.

Award of compensation is hereby made against New York Central Railroad Company, employer, to Luigi Panella, injured employee, at the rate of six dollars and ninety-two cents weekly for a period of eighteen weeks from February 2, 1916, to June 6, 1916, and this claim is hereby continued for further hearing.

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In the Matter of the Claim of MATILDA GEIGER, for Compensation under the Workmen's Compensation Law, against THE GOTHAM CAN COMPANY, Employer; ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY, Insurance Carrier

Claim No. 10133

(Decided June 8, 1916)

Injuries received by Matilda Geiger while employed as a press operator by the Gotham Can Company.

On May 10, 1916, Matilda Geiger, while employed as a press operator by the Gotham Can Company, a corporation manufacturing tin cans in the borough of Brooklyn, city of New York, was working on a press shaping covers for cans, when the press suddenly repeated and caught her right hand, necessitating a partial amputation thereof. Her average weekly wage was the sum of six dollars and seventy-three cents. An award was made.

Robert W. Bonyng, Chief Counsel to State Industrial Commission.

Alfred W. Andrews, attorney for employer and insurance carrier.

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BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award as follows:

On May 10, 1916, the day when Matilda Geiger received her injuries, she resided at 746 Humboldt street, borough of Brooklyn, city of New York, and was employed as a press operator by the Gotham Can Company, a corporation engaged in the business of manufacturing tin cans, with a plant and place of business at 60-68 Eagle street, borough of Brooklyn, New York city.

On said date while working for her employer at her employer's plant, and while working on a press shaping covers for cans, the press accidentally repeated and the first phalange of the right hand of Matilda Geiger was caught in the press, and she received a traumatic amputation of one-eighth of an inch of the bone, same being a substantial portion of the bone.

The average weekly wage of Matilda Geiger was the sum of six dollars and seventy-three cents.

Award of compensation is hereby made against the Gotham Can Company, employer, and Zurich General Accident and Liability Insurance Company, insurance carrier, to Matilda Geiger, injured employee, at the rate of five dollars weekly for a period of fifteen weeks for the loss of one-half of the middle finger of the right hand.

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In the Matter of the Claim of GEORGE R. WINTERS, for Compensation under the Workmen's Compensation Law, against WELLS BROTHERS COMPANY, Employer; LONDON GUARANTEE AND ACCIDENT COMPANY, Insurance Carrier

Claim No. 35711

(Decided June 8, 1916)

Injuries received by George R. Winters while employed as a metal lather by Wells Brothers Company.

On March 1, 1916, George R. Winters, while employed as a metal lather by Wells Brothers Company of New York city, was engaged in lowering a spiral into a column by means of a rope over a wooden horse, when

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the rope slipped and caused injuries to his right hand, necessitating a partial amputation. His average weekly wage was the sum of thirty-one dollars and seventy-three cents. An award was made.

Robert W. Bonyng, Chief Counsel to State Industrial Commission.

William Butler, attorney for insurance carrier.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award, as follows:

On March 1, 1916, the day when George R. Winters received his injuries, he resided at 114 Vanderveer avenue, Woodhaven, L. I., and was employed as a metal lather by Wells Brothers Company, a corporation engaged in the general building construction business, with an office at 33 West Forty-second street, borough of Manhattan, city of New York. At the time of the accident to George R. Winters, Wells Brothers Company were engaged in some building construction at the corner of Nostrand and Park avenues, borough of Brooklyn, city of New York.

On said date while George R. Winters was working for his employer at the site of said construction work and was engaged in lowering a spiral into a column by means of a rope over a wooden horse, the rope slipped, thereby drawing Winters' right hand between the rope and the horse, severely mashing the fingers of that hand. The entire three phalanges and a part of the first metacarpal phalanges of the index, second and little finger of the right hand had to be amputated by reason of said injuries and the third finger was ankylosed at both joints and at the knuckle, which injuries have resulted in the permanent loss of use of the right hand.

The average weekly wage of George R. Winters was the sum of thirty-one dollars and seventy-three cents.

Award of compensation is hereby made against Wells Brothers Company, employer, and London Guarantee and Accident Com-



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pany, insurance carrier, to George R. Winters, injured employee, at the rate of twenty dollars weekly, for a period of 244 weeks, beginning March 1, 1916, for the equivalent of the loss of his right hand.

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In the Matter of the Claim of PETER COHEN, for Compensation under the Workmen's Compensation Law, against ROTHSTEIN & PITOFSKY, Employer; ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY, Insurance Carrier

Claim No. 21875

(Decided June 9, 1916)

Injuries received by Peter Cohen while employed as an operator by Rothstein & Pitofsky.

On October 28, 1915, Peter Cohen, while employed as an operator on cloaks and suits by Rothstein & Pitofsky in the city of New York, slipped and fell over a box while going to his work place, and sustained injuries which disabled him until May 17, 1916, and on that date he was still disabled. His average weekly wage was the sum of twenty-three dollars and eight cents. An award was made.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

Alfred W. Andrews, attorney for employer and insurance carrier.

By THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award, as follows:

On October 28, 1915, the day when Peter Cohen received his injuries, he resided at 285 Brook avenue, borough of Bronx, city of New York, and was employed as an operator on cloaks and suits by Rothstein & Pitofsky, a copartnership engaged in the business of manufacturing cloaks and suits with a factory and place of business at 54 East Twenty-first street, borough of Manhattan, city of New York.

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On said date while Peter Cohen was working for his employer at his employer's plant, he slipped and fell over a box while going to his place of work and thereby fractured the surgical neck of the left humerus and thereby became disabled from working from the date of the accident until May 11, 1916, and on that date he was still disabled.

The daily wage of the employee was reported to the Commission by the employer and by the employee to be the sum of six dollars per day, making the Commission rate twenty-three dollars and eight cents for the average weekly wage.

Award of compensation is hereby made against Rothstein & Pitofsky, employer, and Zurich General Accident and Liability Insurance Company, insurance carrier, to Peter Cohen, injured employee, at the rate of fifteen dollars weekly for the period of twenty-six weeks from November 11, 1915, to May 11, 1916, and this claim is hereby continued for further hearing.

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In the Matter of the Claim of MARY GRIFFIN and Minor Children,  
for Compensation under the Workmen's Compensation Law,  
for the Death of JOHN GRIFFIN, against A. ROBERSON & SON,  
Employer; LUMBER MUTUAL CASUALTY COMPANY, Insurance  
Carrier

Claim No. 17599

(Decided June 14, 1916)

Injuries received by John Griffin, resulting in his death, while employed as a cutter by A. Roberson & Son.

On September 29, 1915, John Griffin, while employed at Lestershire, Broome county, by A. Roberson & Son, was carrying stock to the racks and had to pass another employee named Cartwright who was putting blind rails on a rack, and one of his rails struck Griffin as the latter passed Cartwright. Griffin then kicked Cartwright, who shoved Griffin against a corner of a scrap box, resulting in Griffin sustaining two broken ribs and causing an attack of acute Bright's disease, of which he died on October 20, 1916. His average weekly wage was the sum of twelve dollars and ninety-eight cents. An award was made.

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Robert W. Bonyng, Chief Counsel to State Industrial Commission.

Kelley & Hewitt, attorney for employer and insurance carrier.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award, as follows:

On September 29, 1915, the day when John Griffin received the injuries which resulted in his death, he resided at 77 Dickinson street, Binghamton, N. Y., and was employed as a cutter by A. Roberson & Sons, a corporation engaged in the business of manufacturing millwork, etc., with a plant at Lestershire, Broome county, N. Y.

On said date while John Griffin was working for his employer at his employer's plant and was engaged in carrying some stock to the racks where it was required to be placed, he passed a fellow employee named Cartwright who was putting some b'ind rails on to a rack and one of his rails accidentally struck Griffin as he passed Cartwright. Griffin became angry over this accident and he kicked Cartwright who in turn shoved Griffin and Griffin fell over against the corner of a scrap box, thereby fracturing two ribs on his right side. He finished working the same day but did not return to the plant until Saturday, October second, when he announced that he would be able to return the following Monday, but in fact never returned to work again, and died on October twentieth of acute Bright's disease. Previous to the accident Griffin had been a man of good health and a regular worker and had never complained of being ill. He had not had a doctor in eighteen years. Immediately after the accident he began to develop symptoms of acute Bright's disease. For four days he voided no urine and in a few days began to vomit blood, and the disease developed so rapidly that he died on October twentieth as above mentioned. Previous to the accident the Bright's disease was in a latent condition which was aggravated by the injury thereby causing his death.

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The average weekly wage of John Griffin was the sum of twelve dollars and ninety-eight cents.

John Griffin left him surviving his widow, Mary Griffin, aged thirty-nine years; his daughter, Anna, aged sixteen years; his daughter, Agnes, aged twelve years; his daughter, Katherine, aged ten years; and his daughter, Mary, aged seven years, the claimants herein, and no other child or children under the age of eighteen years.

The failure of John Griffin to serve upon his employer a notice of injury within ten days, and the failure of his widow and children to serve a notice of death upon the employer within thirty days of death did not prejudice the employer.

Award of compensation is hereby made against A. Roberson & Son, employer, and Lumber Mutual Casualty Company, insurance carrier, to the widow and children of John Griffin, deceased employee, as follows: to Mary Griffin, widow, aged thirty-nine years, at the rate of three dollars and eighty-nine cents weekly during widowhood, with two years' compensation in one sum upon remarriage; and to Anna, daughter, aged sixteen years; and to Agnes, aged twelve years; and to Katherine, daughter, aged ten years; and to Mary, daughter, aged seven years, at the rate of one dollar and nineteen cents weekly each, until they shall respectively arrive at the age of eighteen years; and if the payment to any of the said daughters shall by any reason cease, the payment to the remaining daughters shall be increased until they shall receive the sum of one dollar and thirty cents per week, said payments to commence as of October 20, 1916. And to Mary Griffin in the sum of one hundred dollars on account of the funeral expenses of John Griffin, deceased. The failure of John Griffin, deceased employee, to serve upon his employer a notice of injury within ten days of the said injury, and the failure of his widow and children to serve upon the employer a notice of death within thirty days of death are hereby excused on the ground that the employer was not prejudiced by such failures.

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In the Matter of the Claim of MARY TIEDEMAN, for Compensation under the Workmen's Compensation Law, for the Death of FRANK TIEDEMAN, against CHELSEA FIBRE MILLS, Employer; AMERICAN MUTUAL INSURANCE COMPANY, Insurance Carrier

Claim No. 767

(Decided June 14, 1916)

Injuries received by Frank Tiedeman, resulting in his death, while employed as a foreman by the Chelsea Fibre Mills.

On January 6, 1916, Frank Tiedeman, the deceased, was recalled from his home to the mill of his employer because of a fire having broken out. Tiedeman and others put out the fire. He worked until January 26, 1916, and on February seventh he died of pneumonia. Held, that it had not been shown that pneumonia resulted from deceased's exposure at the fire twenty days before deceased took to his bed. Award denied.

This is a claim made by the widow of Frank Tiedeman, who died on February 7, 1916, as the result, as the claimant holds, of an accident which occurred on January 6, 1916. Mr. Tiedeman was a foreman, or man in charge of other men, in the employ of the Chelsea Fibre Mills and on January 6, 1916, had started for his home when he was recalled to help fight a fire which had broken out in the mill. The temperature on that night was 29 or 30 Fahrenheit. The fire was of very little consequence, Mr. Tiedeman and others having put it out by the use of hose. It is claimed that he became wet through the use of the hose and this is probably so, although there is not much testimony about it, he having changed his clothes before returning home. He continued to work until the twenty-sixth day of January, when he returned home complaining of very severe pains, took to his bed and developed lobar pneumonia, from which he died on February seventh.

Robert W. Bonyng, Chief Counsel to State Industrial Commission.

Mr. Brooks, for insurance carrier.

Claimant in person.

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LYON, Commissioner.— Assuming without deciding that death resulting from pneumonia contracted while fighting a fire in the premises of the employer is the result of an accidental injury within the Compensation Law, I am not able to find as a matter of fact that Mr. Tiedeman contracted the disease from which he died as a result of the exposure at the fire in the Chelsea Mills on January 6, 1916. The testimony from which a finding might be made that death resulted from such exposure, practically consists of the testimony of the widow as to what Mr. Tiedeman said about the exposure at the fire and what his condition was from the time of the fire until his death. This testimony is not very explicit but it may be assumed to be as favorable to the claimant as possible. The claimant in her statement, among other things, testified, as follows: "He got pains all over his body and sides. Q. That same night? A. No. Q. He complained that night of being chilly? A. Frozen. Q. What did you give him that night? A. Nothing that night. Q. In the morning how was he? A. He then started with pains. He was tired and he started to tell me he could not rest with the pains in his side. He could not lay in bed with the pains, but still he went to work. The only thing he would take for a cold was a hot lemonade, and if he would get a cough he would take Father John's Medicine. I cannot tell you how many lemonades I gave him. He kept on with the home treatment until January 26th, when he came in and said 'I am all in.' I said, 'What happened to you?' He said, 'I have such a cold and such a headache that I cannot stand on my feet,' and he said 'I will never tell you how I got home.' He said, 'Put me in bed.' I gave him Jamaica rum, quinine, with lemon in the rum and a dose of castor oil and he slept, and on Thursday he could not hold his head up, but sleep, and I called in Dr. R. C. Gray of 198 Green avenue."

It seems to me that Mrs. Tiedeman has, in this statement, been giving rather a resume of Mr. Tiedeman's condition for some time after the fire, than his condition on the day following, for she testified in another place, as follows: "Q. From the time of the fire Mr. Tiedeman worked until noon of January 26th? A. Yes. Q. Did he seem to be getting better or was he getting worse during

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that three weeks? A. All I can say he complained more each day of the pains, but with the ambition of a man, he did not tell me everything. If he had told me he got a cold that night, I would have doctored him right away, but I kept home remedies. Q. Was he complaining of a pain in the side every day? A. I could not say."

It seems that the Chelsea Fibre Mills had some sort of dispensary, or first-aid establishment, of which Miss Fanny Cordelia Hartwell is in charge. She testified: "Thursday, January 20th, 1916, after the fire was the first time he came in, and then it was for indigestion and I gave him one-half ounce rhubarb of soda and then I gave him rhubarb and soda tablets, three after dinner—now that must have been to take three after dinner. Q. Have you any memory of this? A. No, I have not, only my book. Q. Do you remember the man? A. I do know Mr. Tiedeman. Q. If, at the time Mr. Tiedeman saw you on the 20th day of January for indigestion, he had been suffering from a cold, would you have done anything in the way of prescribing for him or directing him to Dr. Heath? A. Yes I would, and if he had had a temperature I would have called up Dr. Heath to know what to do. Q. You saw him on what date? A. Wednesday, January 26th. Q. Had the doctor been here that day? A. No, that was at 8:30 in the morning. Q. What was his trouble then? A. He had a temperature of 101 degrees, pulse 72, respiration 26. He had a pain in the right side and both legs. He said he could hardly walk upstairs."

There is considerable testimony to the effect that Mr. Tiedeman between the sixth and twenty-sixth of January, while attending to his duties about the mill, was frequently exposed with rather insufficient clothing, often being out without an overcoat in rather inclement weather. From this, taken in conjunction with the fact that apparently he had no temperature up to as late as January twentieth and probably not until January twenty-sixth, I am unable to find that the development of lobar pneumonia was the result of his exposure at the fire twenty days prior to the time when he took to his bed. I am brought to this conclusion, among other things, by the statement of Dr. J. Mott Heath, who was his family

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physician. Dr. Heath testified, as follows: "Q. What would you say Doctor, as to the cause of this trouble of his, if you knew that on or about the night of January sixth, he helped fight a fire, at which time he got at least his feet wet and then at later times during the three weeks that he continued in his employment, he was out, directing work in the open air without any overcoat. Is there any way of placing the exact cause of the trouble with which he died? A. There is hardly any way of fixing the cause, but in this case it seems that he was sufficiently exposed to contract pneumonia, and we all know that pneumonia follows upon an exposure of some kind with lowered resistance. Q. Do you mean that his physical condition was such that he would be more susceptible than the ordinary person? A. Yes. Q. Could you say; Doctor, that the cause of the trouble with which he died originated at the fire at which time he became wet, more than a month before he died? A. I do not think that a doctor could express himself that definitely. As the time that he was taken ill was so remote from the time of exposure to cold and wet, you would think if pneumonia were to develop, hardly that much time would elapse."

This is the exact frame of mind in which a layman finds himself after reading this whole testimony. It does not seem to me that pneumonia contracted on the twenty-sixth day of January would remain latent to such an extent as not to prevent a man from working for twenty days. I am unable to find as a fact that Mr. Tiedeman's death resulted from an accidental injury "arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom," and I, therefore, advise that an award be denied.



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State Industrial Commission

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In the Matter of the Claim of KATHARINA MOELL, for Compensation under the Workmen's Compensation Law, for the Death of HENRY MOELL, against JOHN E. WILSON, Employer; GENERAL ACCIDENT INSURANCE COMPANY, Insurance Carrier

Claim No. 15443

(Decided June 14, 1916)

Injuries received by Henry Moell, resulting in his death, while employed as a carpenter by John E. Wilson.

On December 28, 1915, Henry Moell, while employed as a carpenter by John E. Wilson at Buffalo, N. Y., was at work on a building in that city, began cleaning the snow from the roof when he slipped and fell to his death. Compensation was resisted upon the ground that the deceased was injured while engaged in doing something he had been warned not to attempt, also upon the further ground that the dependency of the widow had not been shown. *Held*, that the defense had not been sufficiently established. An award was made.

This is a claim made by Katharina Moell, widow, for compensation growing out of the death of her husband, Henry Moell, on the 28th of December, 1915. Henry Moell was a carpenter and was employed, together with another carpenter named Banzer, by John E. Wilson. They had worked on December twenty-seventh shingling a building at No. 880 Walden avenue in the city of Buffalo. They had completed the shingling with the exception of a part of one course of shingles on that day. It snowed during the night and on the following morning Moell and Banzer were about to complete the shingling. Moell seems to have gone upon the roof to clean off the snow and in some way, not explained, fell and his death resulted from the fall.

Robert W. Bonyngue, Chief Counsel to State Industrial Commission.

H. W. Pottle, for insurance carrier.

Claimant in person.

LYON, Commissioner.— Payment of compensation is resisted on two grounds, namely, that Moell was working in disobedience to

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his employer's orders at the time when he was injured, and on the further ground that there is no proof that the widow was dependent upon the employee's earnings at the time of the accident. So far as the latter claim is concerned, it is sufficient to say that this Commission has repeatedly held that a widow is entitled to compensation under the act altogether apart from the question of dependency. The statute simply makes the fact of widowhood sufficient to sustain a claim for compensation in a case otherwise compensatable.

It is claimed by the employer that on the morning when Moell was injured, he, the employer, told him to go to a job on Sumner avenue and not return to the Walden avenue premises for the purpose of completing the shingling, and it is because of Moell's alleged disobedience of this direction that the claim for compensation is resisted. The following is the statement of the employer as to the directions given Moell: "Q. You had a conversation with the decedent the morning of his death, did you not? A. I did. Q. Go on and state what you said and what he said? A. Well, the next morning it snowed. Q. What date was that? A. On the twenty-eighth. Q. Of December, 1915? A. Yes. And I walked around there. I live the next place and Moell was there walking up and down with his hands in his pockets and I says, 'To tell the truth, why in hell didn't you finish up that shingling last night.' Well, he says 'We didn't get done,' and I says: 'You fellows get to work in a few minutes, you know it can't be finished now. There is snow on the roof and the job will wait a few weeks.' 'Well, he says, 'We will finish it.' I says: 'No, let it go.' He spoke to me in German and says, 'If you don't do the job you won't get the money,' and I says, 'Never mind that, go on down and lay your floors,' and he says, 'I will wait until the snow gets off and go on.' Then I went on down to the Sumner avenue job, and when I got down there— Q. You told him to lay floors down on Sumner avenue? A. I says, 'Come on down and lay the floors.' Q. Which was on? A. Sumner avenue, this other job he had worked on. And when I got down there Mr. Banzer was there and two other men. He was in there looking at his tools; Mr. Banzer was. Q. This was on the Sumner avenue job? A. Yes. And I said.

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'Why didn't you fellows finish the job up? and he says, 'There weren't enough shingles.' I says, 'There is two bundles in there,' and Moell knew where they was. He says he did not know. I says, 'take your screw driver and finish up in there on the doors and Moell is coming to lay the floor.' So he took his screw driver and went back on Walden avenue. Q. Back to the place where they were shingling the house? A. Yes. Of course, I expected Moell to come down Sumner avenue all the time and shortly after that I got a telephone to go home."

It may be admitted that a workman who is injured while performing some service which he is distinctly told not to do, would not be entitled to compensation, but the present is a somewhat different case. Mr. Wilson had expressed himself as greatly displeased that the small amount of shingling had not been completed on the previous night.

From a reading of all the testimony, I am of the opinion that neither Mr. Moell nor Mr. Banzer understood Mr. Wilson's direction to be a positive command not to complete the shingling. The fact that there was only a slight amount of it to be done, that the material to complete it was found on the following morning to be on the ground, and that they were both present with their tools, coupled with the fact of Mr. Wilson's displeasure that the shingling had not been completed, would so far make an implied modification of Mr. Wilson's direction to go to the Sumner avenue house to lay floors, that it excused the short delay which it was supposed would ensue for the purpose of completing the shingling job, and this was apparently the opinion of Mr. Banzer, and we may well suppose that Mr. Moell, whose voice cannot now be heard, received the same impression from Mr. Wilson's talk and demeanor. Mr. Moell was the partner of Mr. Banzer on the shingling job and might very well have supposed that if Banzer worked, his employer would expect him to assist him. Mr. Banzer testified as follows: "Q. Now where did you first see Mr. Moell the morning of the accident? A. On the corner. Q. Corner of what? A. Walden and Poplar avenue. Q. Did you have any conversation with him? A. No, sir; only to say 'Good morning Moell.' Q. And you went in and commenced to do some work? A. Yes, I put the

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ladder up. Q. What did you do after you put the ladder up? A. I had my hatchet over in Mr. Wilson's garage and went over and got the shingling hatched and Moell got his and I climbed up the ladder and climbed on the roof and cleaned off the snow and Moell came up behind me and was sweeping the snow off the gutter while I went on with the job. Q. What happened after that? A. After I cleaned off the snow off the sides, I says: 'Moell you need not come up here.' I says: 'You stay down there and cut the shingles. I will give you the length of the shingles and you cut and I will handle them because the ridge board was on the other side and you need not cut them off.' I just looked around and I says: 'Nine and one-half inches' and there he fell. Q. He fell to the ground? A. Yes, and I went down as fast as I could and picked him up, etc."

Again Mr. Banzer testified: "Q. When Mr. Wilson was absent from the job on which you were employed, did you have charge of the men working on the job? A. When a man sends a couple of men on a job we work together. Q. How did you come to tell Mr. Moell to cut the shingles the length you gave him? Were you his foreman? A. Because he was an old man and I didn't want him to go up on the roof. I thought I should do it. Q. Did you tell him to cut the shingles? A. Yes to cut them and I would handle them. Q. Did you understand, when you were told to fix the doors, that that meant when you got the shingles done? A. I supposed after we finished up. Q. You were supposed to do the shingling before you hung the doors? Did you understand you were to complete this shingling job before you went over to the building on Sumner avenue? A. I understood it that way or I would not have went at it."

Under all the circumstances of the case, I am of the opinion that Mr. Wilson's direction was not so definite and positive with reference to leaving the shingling job that it ought to be held that the deceased put himself outside of the employment, by remaining to do the comparatively small amount of work which he had been censured for not completing the day before. I think he was injured in the course of his employment and I advise an award accordingly.

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State Industrial Commission

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In the Matter of the Claim of ELLEN MINNIS, for Compensation under the Workmen's Compensation Law, for the Death of HENRY MINNIS, against JOHN YOUNG, Employer; HARTFORD ACCIDENT AND INDEMNITY COMPANY, Insurance Carrier

Claim No. 15359

(Decided June 14, 1916)

Injuries received by Henry Minnis, resulting in his death, while employed by John Young, at Syracuse, N. Y.

On October 30, 1915, Henry Minnis was injured severely while at work for John Young, and was removed to a hospital, where delirium tremens developed, and on December 15, 1915, Minnis died. This case turns upon a question as to when delirium tremens alcoholic cases may be said to be the cause of death and when the injuries themselves may be said to result in death. An award was made.

The claim arose out of the death, on December fifteenth, of Henry Minnis, at the House of Good Shepherd, in the city of Syracuse. Mr. Minnis, on October thirtieth, received an injury resulting in "spiral comminuted fracture of the left femur extending from lesser trochanter down to below the middle of femur, the lesser trochanter being detached from shaft." After his removal to the hospital he became delirious, developed bed sores and died apparently from delirium tremens. The insurance carrier resists the claim for compensation under the facts and circumstances of the case, supplemented by proof that the injured man drank considerable quantities of ale surreptitiously furnished him by his friends after he entered the hospital, and the claim is made that the drinking of these quantities of ale was one of the producing causes of the delirium.

Robert W. Bonyng, Chief Counsel to State Industrial Commission.

Alfred M. Bailey, attorney for insurance carrier.

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State Industrial Commission

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LYON, Commissioner.—It is not claimed by the insurance carrier that Mr. Minnis was an inordinate drinker before his injury, nor that drink had anything to do with causing his accident. The medical testimony in the case seems to harmonize completely with decisions made both by this Commission and by the court to the effect that where a man, accustomed to the use of alcoholic liquor in his lifetime, receives a severe injury which incapacitates him from labor and produces delirium tremens, death is due, within the meaning of the compensation law, to the injury. It seems to be well recognized by the medical profession that the continuous use of alcohol produces such a condition in the system that a severe shock or injury is quite likely to produce in the patient, when he ceases to follow his usual vocation, delirium tremens. In the case of *Sullivan v. Industrial Engineering Company*, decided by the Appellate Division of the third department in May, 1916, Judge Woodward, in writing the opinion of the court, said: "Acceleration of death from delirium tremens through an injury bringing on or aggravating the condition of alcoholism or tremens, has been held to sustain liability for the death as produced by the injury both in tort actions and under the Compensation statute. (*McCahill v. New York Transportation Company*, 201 N. Y. 221; *Carroll v. Knickerbocker Ice Company*, 169 App. Div. 450; *Winter v. New York Herald*, 155 N. Y. Supp. 1149.) Therefore, even if the element of lobar pneumonia or weakened resistance, due to the impact of the water-soaked timber, be laid aside, and the theory of death from delirium tremens accepted, the causal condition is sufficient under the authorities, and the award is not made under the circumstances giving this court right or reason to reverse or remand."

The physicians in the present case, I think, are practically agreed that the injury to Mr. Minnis was sufficient to be the producing cause of the delirium tremens from which he died, and the case, therefore, would ordinarily come directly under the opinion in the *Sullivan* case, just quoted.

It remains to consider what effect upon our decision the undisputed fact that Minnis was furnished with considerable quantities of ale after he entered the hospital, ought to have. The

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testimony as to the amount of ale which Mr. Minnis drank is not very specific. It was furnished him by his fellow workman, who apparently thought they were doing him a kindness, and the testimony is that it was brought to his bedside to the extent of three or four bottles at a time. It is stated that these bottles held about a pint each. The witnesses who brought it said that Minnis would drink a part of the bottle and ask the nurse to put the balance on ice to keep for him. The evidence also is that bottles were found about his bed. I think it cannot be held under the evidence that he drank more than two or three bottles per day, although the physician in attendance apparently came to the conclusion before he knew the facts that some one was furnishing him with liquor. Having been assured of the fact he went to the employer and stated to him that Minnis would not live unless the giving of liquor was stopped, and the employer gave orders to his other employees to cease furnishing the ale, and this order seems to have been complied with. It is of course well known that ale contains only a very small quantity of alcohol and it certainly would seem that no very large amount of alcohol could be derived from the amount of ale which Mr. Minnis drank in the hospital. The most that the physicians would say as to the effect of the ale is that it would tend to aggravate his delirious condition. None of them claimed that it produced it. The consensus of medical opinion seems to be as already stated, that the delirium was produced by the injury and was merely made worse by the indulgence in ale. I am not able to find upon the testimony that the indulgence in ale so far aggravated Mr. Minnis' condition as to be the procuring cause of his death.

Under all the circumstances of the case, the very severe injury which he suffered being taken into account, together with the fact that a man in the habit of strenuous daily exertion is laid aside where he has no exercise, I am of the opinion that Mr. Minnis' death has been traced with reasonable certainty to his accident, "arising out of and in the course of his employment and such disease or infection as may naturally and unavoidably result therefrom," within the meaning of subdivision 7 of section 3 of the Compensation Law, and I advise an award accordingly.

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State Industrial Commission

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In the Matter of the Claim of CHARLES H. RICHARDSON, for Compensation Under the Workmen's Compensation Law, against BUILDERS' EXCHANGE ASSOCIATION, Employer; ZURICH GENERAL ACCIDENT AND LIABILITY COMPANY, LTD., Insurance Carrier

Claim No. 65700

(Decided June 14, 1916)

Injuries received by Charles H. Richardson, by the accidental turning of a valve on a steam pipe, while employed by the Builders' Exchange Association.

On March 30, 1915, while Charles H. Richardson was employed about the plant of the Builders' Exchange Association he climbed up over a steam pipe to turn off a valve but the pipe was so hot that after taking hold of it Richardson released his grasp and fell across another hot pipe inflicting injuries which necessitated his leaving work for several days. By October fifteenth his condition was serious and developed into cancer necessitating a serious operation. An award was made.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

John N. Carlisle and Valentine Ahern, attorneys for insurance carrier.

LYON, Commissioner.—The claimant, Charles H. Richardson, was a rather heavy man and was employed about the plant of his employer on March 30, 1915, and climbed up over a steam pipe for the purpose of turning off a valve. The pipe was hot and Mr. Richardson after taking hold of it released his hold and fell, striking straddle of a hot pipe and incidentally turning a valve which released hot steam which burned him considerably. The injury didn't at the time seem serious. He put on some applications at his home and it ceased to be painful after three or four days. It was not until a considerable length of time afterwards that he had any apparent trouble or discomfort from his accident, but by October fifteenth he found himself in a serious condition.



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At that time, he ceased work, and on applying to his physician, his condition was diagnosed as epithelioma or cancer. The physician advised an immediate operation and an operation was had, and while Mr. Richardson has to a certain extent recovered, he is not yet fully recovered and it is doubtful whether the case may not develop into a permanent injury.

The question to be determined is whether his present condition is the result of the accident.

The insurance carrier claims that the length of time between the injury and the development of the epithelioma negatives the idea that the latter was caused by the former. The case is one where there is a difference of medical opinion. Two of the physicians called were of the opinion that the cancer could be traced, with reasonable certainty, to the injury, and in this opinion, Dr. Lewy, medical expert of the Commission, seems to concur; while two or three others are of the contrary opinion.

Epithelioma appears to be a form of cancer which develops most usually on that portion of the human system where the mucous membrane joins with the outer skin; for instance, at the mouth, nostrils, rectum, etc. It is also the opinion of all the physicians that cancer very frequently develops, if not as a result of a burn, at least in the position where a burn has left an old scar, being caused in many cases by continuous irritation of the previously existing scar. It is therefore quite evident that the elements to connect the epithelioma in this case with the injury are present.

Dr. Kingsbury, called by the insurance carrier, testified that this form of cancer is of extremely rare occurrence. Asked specifically, if one man in 1,000,000 was so afflicted, he said, "No." Asked whether one man in 5,000,000 was so afflicted, he was not certain. In any event, it is undisputed that this form of disease is extremely rare in the human species. The form of injury which Mr. Richardson received is also extremely rare.

Taking these facts into consideration, it is extremely difficult to disabuse the mind of the fact that where the extremely rare disease of this form of epithelioma concurs with the extremely rare accident of a burn such as claimant sustained, that one is not caused by the other. Of course it is conceivable that these two exceedingly rare occurrences might coincide without there being

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a casual relation between them, but the chances of such a coincidence are so remote that the mind generally would refuse to believe that such is the case.

I am of the opinion that the claimant's injury has been connected, with reasonable certainty, with the accident which happened to him on March 30, 1915, and that he is therefore entitled to an award.

The carrier raises the point that the claim should be denied because of the delay in giving notice of injury. Section 18 of the act provides: "The failure to give such notice, unless excused by the Commission either on the ground that notice for some sufficient reason could not have been given, or on the ground that the State Fund, insurance company, or employer, as the case may be, has not been prejudiced thereby, shall be a bar to any claim under this chapter."

The reason for not giving notice earlier, was undoubtedly because the claimant did not know that the injury was of a serious nature. The reason for requiring early notice is apparently in order that the employer may either investigate to determine whether the employee is truthful in his claim of injury or that he may offer treatment to prevent serious consequences from the accident. In the present case, there is no serious claim that the claimant was not injured as stated. So far as treatment is concerned, it is not at all probable that the employer or the insurance carrier, if notice had been given, would have appreciated the danger of cancer any more than claimant did, until the cancer had developed and at that time nothing could be done that has not now been done. I think the insurance carrier was not prejudiced by the delay in giving notice.

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State Industrial Commission

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In the Matter of the Claim of IDA M. DOWLING, for Compensation Under the Workmens' Compensation Law, for the Death of MICHAEL T. DOWLING, against NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Employer and Self-Insurer

Claim No. 191

(Decided June 14, 1916)

Injuries received by Michael T. Dowling, resulting in his death, while employed as a section hand by the New York Central and Hudson River Railroad Company.

On June 28, 1915, near Ghent, N. Y., Michael T. Dowling was run down and killed by a train while sitting upon one of the rails of the track. He was on his way to where his gang was employed but had sat down and paid no attention to the whistle of the approaching train. There was evidence that he was intoxicated at the time. Award denied upon the ground that deceased was either bent on suicide or was too intoxicated to know what he was doing in remaining upon a railroad track and paying no attention to an oncoming train.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

Frederick T. Davies, attorney for claimant.

O. G. Browne, attorney for employer.

LYON, Commissioner.—The claim is made for compensation for the death of Michael T. Dowling who was run over by a train of his employer on June 28, 1915, near Ghent, N. Y., causing instant death. Mr. Dowling had been working only a short time for the railroad and had been given a day off and returned to Ghent for the purpose of entering upon his employment on the 28th day of June, 1915, arriving there at about 10:30 A. M. He had apparently been drinking more or less, although several of the witnesses were unwilling to testify that he was so far intoxicated as to not have control of himself, and others who knew him well testified that they never knew him to drink. He stayed near

the station for a couple of hours, ate his dinner, changed his clothing and started for the place where his gang were working shortly after noon. The engineer of the train which ran over him, as well as the fireman, testified that when first seen Dowling was sitting upon one of the rails of the track upon which the train was coming, facing the other rail of the same track, crouched up with his head bent over in such wise that for a time they supposed it was a dog on the track. They sounded the whistle continuously, but without making any apparent impression upon Dowling, and although they slowed the train up as rapidly as possible when they found it was a man, they were unable to stop the train before it had run over him. Dowling in the meantime giving no apparent heed to the approach of the train up to the time when he was struck. The employer claims that if Dowling's injury arose out of and in the course of his employment, he either committed suicide by voluntarily subjecting himself to the hazard or was so intoxicated that his death was due solely to that cause.

I am unable to see how the claimant can succeed on any theory of the Compensation Law. It appears by the evidence that Dowling was to perform his service two miles or two and one-half miles from the place where he left the train in the morning. He started to reach his place of work by walking down the track staggering from side to side, and the testimony is that one of his co-employees seeing his condition and that he was apparently so under the influence of liquor that he could not take care of himself, seized him on the approach of a freight train and forcibly dragged him off the track and held him until the train had passed by. Afterwards he continued on down the track and nothing more was heard of him until report of his death was received.

While an employee, generally speaking, is under the Compensation Act from the time when he enters upon the plant of his employer for the purpose of engaging in his occupation, I am inclined to think that in the present case it cannot be held that Dowling was covered by the act at the time of his death. An employee of a railroad who can, if he chooses, enter upon the track of his employer two miles and a half from the place of his employ-

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ment, but who has the option to proceed to his work by some other route not within the railroad hazard and whose hours of service do not actually begin until he arrives at the place of work, is not, while he is reaching his job, in my opinion, covered by the Compensation Law.

Be that as it may, I am very clearly of the opinion that the employer has overcome the presumption of the statute set forth in section 21, and that Mr. Dowling's death was caused either by his willful intention to cause his own death or solely from his intoxication. Apparently Mr. Dowling was a good deal under the influence of liquor when he started for his job and it is inconceivable to me that any man who was not either bent on suicide or too intoxicated to know what he was doing, would deliberately seat himself upon the track of a railroad and go to sleep or remain motionless upon the approach of a heavy train whose whistle was sounding for a long distance before it reached him. It is true that the evidence comes very largely from employees of the railroad, but I do not think they can be held to be so biased by a desire to hold their positions, as to be unworthy of belief. I advise that an award in this case be denied.

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In the Matter of the Claim of FRANK BACKMAN, for Compensation Under the Workmen's Compensation Law, against DWIGHT DEVINE & SONS, Employer; TRAVELERS' INSURANCE COMPANY, Insurance Carrier

Claim No. 14669

(Decided June 14, 1916)

Injuries received by Frank Backman while employed in the factory of Dwight Devine & Sons.

On October 4, 1915, Frank Backman, while employed at Dwight Devine & Sons factory at Ellenville, N. Y., was struck in the chest by fragments of a grindstone which burst. He has since developed a bad case of tuberculosis; up to the time of the injury he was of robust appearance but had had some trouble with a cough which his physician stated came from a bad throat and not from the lungs.

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State Industrial Commission

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Where a previous diseased condition which did not prevent the workman from continuing his employment is accentuated or accelerated by an injury so that the workman cannot render service, the injury is the cause of the disability within the meaning of the Compensation Law, notwithstanding the previous diseased condition. An award was made.

Cleon B. Murray, attorney for claimant.

Thomas F. Hurley, attorney for insurance carrier.

James M. McClosky, attorney for insurance carrier.

LYON, Commissioner.—The claimant was injured on October 4, 1915, by the bursting of a grind stone upon which he was at work in the factory of the employer at Ellenville, N. Y. The stone when it burst struck the claimant in the chest, not making an abrasion of the skin but a red spot about half the size of the hand. He also had an abrasion or contusion over one of his eyes and a black and blue spot on one leg. The injury did not at the time seem to be very serious. The claimant was able to walk around, and while he was taken to his home in a conveyance he requested to be allowed to walk into the house rather than be assisted, in order not to frighten his wife. He was treated by Dr. Devine, a member of his firm of employers, a physician of several years' standing. He was able to be out within a day or two and was advised by the doctor to keep around and out of doors which he did. He was taken worse on the following Saturday, the injury having occurred on Monday, and since that time has apparently developed a rather bad case of tuberculosis. If the accident can be held to be the cause of the development of tuberculosis, he will be entitled to compensation apparently for considerable time as his present physical condition is bad.

While the medical testimony is at variance upon the question whether the claimant's present condition can be traced with reasonable certainty to the accident, there is not very much divergence of opinion either as to the claimant's previous or as to his present condition. The claimant before his injury was a man of rather robust appearance, five feet and seven or eight inches in height

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and weighing about 165 pounds. The testimony is that he worked with a good deal of regularity before his injury and that his health appeared to be fairly good. On the other hand, there is no question but that he was afflicted with tuberculosis before he was injured. He had had a cough, he had complained of not feeling well, he had been for some weeks spitting blood, although his doctor was of the opinion that the blood came from a bad throat rather than from the lungs. The physician for the company was of the opinion that he would by this time have been all right if he had been in a normal condition when injured. While she did not think his injury at first was very serious, she was concerned about his cough and watched the condition of his lungs, fearing that the concussion may have lacerated them. The medical experts all agree that in a case of latent tuberculosis, a bruise over the chest of any considerable degree of severity might be a sufficient contributory cause for a rapid development of tuberculosis.

In my opinion that is the precise situation here. Mr. Backman was undoubtedly tubercular at the time when he was hurt, but from all appearances, he would have been able to continue work for almost any length of time without the disease progressing so far as to incapacitate him. The evidence now is that he has lost a great amount of flesh, that he is unable to do any work, that he is rather growing worse than otherwise, and the photographs offered in evidence show a sufficient difference in his physical condition before and after the accident, to make the inference that he may never be able to resume his former or any employment, perfectly justifiable.

This Commission has repeatedly held that where a previous diseased condition which did not prevent the workman from continuing his employment is accentuated or accelerated by an injury so that the workman cannot render services, the injury is the cause of the disability within the meaning of the Compensation Law, notwithstanding the previous diseased condition, and this position has been repeatedly upheld by the courts.

In my opinion the case is compensatable and I advise that the award of compensation be continued.

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In the Matter of the Claim of KATE NELSON and Daughter, for  
for Compensation Under the Workmen's Compensation Law,  
for the Death of Joseph Nelson, against THOMAS McLARNON  
& Co., INC., Employer; TRAVELERS' INSURANCE COMPANY,  
Carrier

Claim No. 54285

(Decided June 14, 1916)

Injuries received by Joseph Nelson, resulting in his death, while employed  
as a teamster by Thomas McLarnon & Co., Inc.

On January 6, 1915, Joseph Nelson was assisting in piling steel beams  
on a dock and in handling one of the beams it slid along the pile jamming  
into his left side. In attempting to hold the beam Nelson sustained an  
unusual strain resulting in pulmonary tuberculosis and on July 21, 1915,  
he died. An award was made.

MITCHEL, Chairman.—Joseph Nelson, deceased, the employee  
out of whose injury this claim arises, was an employee of Thomas  
McLarnon & Co., Inc., of New York city, truckmen and riggers.  
The insurance carrier is the Travelers' Insurance Company. Mrs.  
Kate Nelson, wife, is the principal dependent and claimant for  
herself and Marguerite Nelson, a daughter, aged ten.

A review of the evidence shows that Nelson had been engaged  
in heavy trucking for nine years or more, and that he had worked  
for the said employer off and on for the last three years. It shows  
that he had suffered an accident in April, 1914, resulting in a  
broken rib and probably a punctured lung. This was before the  
Compensation Law was effective, and no claim for compensation  
was based on said injury. From this injury he had recovered and  
began to work, for we have him a claimant under claim No.  
33338 for an injury sustained September 24, 1914, for which a  
claim for compensation was filed, and for which he received an  
award of compensation for a period ending November 12, 1914,  
in an amount of fifty-two dollars and ninety cents. This was an  
injury to the wrist. From this second injury also he had



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recovered, and had returned to work doing the same heavy character of work.

He then sustained an injury on January 6, 1915, at 12:30 o'clock in piling steel beams on dock and in handling a beam which slid along the pile, jamming into his left side. An attempt to hold such beam caused an unusual strain which, with the impact of the beam, constitutes the injury, to which is attributed the fatal result on which the death claim before us is based. For this injury a claim for compensation was filed, the same being No. 54285, upon which an award was made on February 25, 1915, again on April fifth, April fifteenth, May third, May seventeenth and June sixteenth, at which latter date a final award was made, and the case closed, claimant seemingly having recovered ability to work, but he remained much reduced in weight and with markedly diminished health.

After receiving his last payment he did not go to work but went away to his sister's house at Creeks Locks to rest. A rapid decline set in and he died July 21, 1915, from pulmonary tuberculosis.

The accident to his wrist is referred to as showing that he had recovered and returned to work from the accident of September, 1914, and to notice that the attending physician did not at this time notice external signs of tuberculosis, for he answers "no" to the question "is there evidence of tubercular infection."

The question evidently is a medical one. A review of all the medical testimony discloses no serious disagreement, but a very general concurrence of opinion to the effect that the injury caused a latent tubercular condition to become acute, from which death resulted.

Dr. von Unruh: "He suffered a hemorrhage from the left lung, lower part of posterior lobe, in consequence upon lifting heavy iron." This physician made a prognosis of six months, which evidences the expectation of recovery, which is supported by a supplementary report on April 1, 1915, giving probable duration of disability "another two months from this date" and saying, "the lesions in his left lung caused by the hemorrhage appear to be gradually healing up."

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Dr. Lewy, on June eighth: "I would consider the pulmonary hemorrhages in consequence of heavy exertion, due to lifting."

Dr. Charles F. Hunt, May 27, 1915: "Has an active bronchial process now in progress with involvement of smaller air spaces especially upon upper portion of lung, left side — has chronic inflammation of lung." And again on June first: "The hemorrhages complained of were undoubtedly due to changes within the lungs and bronchii, which was brought on by physical exertion."

Dr. von Unruh, testimony before the Commission: "If there was an old healed up injury, the fall (injury?) might have very well torn up any healing scar in the lung and the hemorrhages resulted, and in the event that there was a latent tuberculosis which had been dormant since childhood, it might then have shown tubercle bacilli in the sputum."

Dr. Lewy at the same time commenting upon this testimony: "What the doctor has said is so — a latent tuberculosis, a dormant tuberculosis could be brought into life after many years by an injury."

The fact is well enough established that before the time of the injury in January, 1915, Nelson was tubercular, but he had had sufficient recuperative vitality to recover from the injury of April, 1914, and return to heavy work. Moreover, he was seemingly able to recover from the injury of January, 1915, so as to be able to return to work, although he did not recover lost weight, and "an active bronchial process was in progress."

This apparent second recovery from the injury causing hemorrhages of the lung tends strongly to establish the belief that without the second injury his recovery from the April, 1914, accident would have been permanent and complete.

From all of which I find no trouble whatever in pronouncing the claim a compensatable one. Claimant may or may not have had tuberculosis in April, 1914; he had had an injury to his left lung; he had recovered and resumed the heavy work he had been doing for years; he sustained an injury in January, 1915; after that he appeared to be tubercular, although for a while the specimens of his sputum showed negative results; then positive results; his case was closed and it was recommended that he go to work; he

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did not go to work but went away to rest; rapid decline set in and he died July 21, 1915.

If he was previously tubercular either from the accident of April, 1914, or from general lesions, the accident of January, 1915, rendered the latent tuberculosis acute; while the accident of April, 1914, so weakened him that he became a victim of the second accident, still this fact would not defeat the claim but rather would it account for a condition making the development of tuberculosis from the last accident all the more probable.

His death, therefore, was naturally and unavoidably the result of the injury.

In reviewing claim No. 33338 — Joseph Nelson, as mentioned in the 1st paragraph thereof, there is not absolute certainty that it is the same Nelson, but I have no doubt it is for the following reasons:

The insurance company says it is in a letter to be found in the death file.

He gives his age as fifty-two. This injury occurred in September, 1914. He gives his age as fifty-three in 1915.

In each claim he says he was born in Ulster county, N. Y.

In first claim he says he has worked at this occupation nine years; in second, ten years.

In answer to the question, "how long he worked for present employer?" — "off and on for three years" is the answer in each case.

If married, give name and age of wife; in the former claim he says "Catherine Nelson, 43 years;" in the latter "Katherine Nelson, 40 years" (each form is evidently made out by another person than the person who signed).

In each claim in response to the question, "give address to which mail should be sent, is written "17 Ely Avenue, Long Island City."

In the first claim he makes his mark; in the second appears a very labored signature.

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In the Matter of the Claim of WILLIAM WEAVER, for Compensation under the Workmen's Compensation Law, against C. W. MORGAN, Employer; LONDON GUARANTEE AND ACCIDENT COMPANY, Insurance Carrier

Claim No. 36135

(Decided June 15, 1916)

**Injuries received by William Weaver while employed as a teamster by C. W. Morgan.**

On March 31, 1916, William Weaver, while employed by C. W. Morgan who was engaged in the cooperage business in the borough of The Bronx, city of New York, was driving a one-horse truck when one of the wheels of the truck went into a hole in the pavement on West street and Weaver was thrown from his seat to the street sustaining concussion of the brain. His average weekly wage was the sum of thirteen dollars and forty-six cents. An award was made.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

William Butler, attorney for employer and insurance carrier.

BY THE COMMISSION.— All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award as follows:

On March 31, 1916, the day when William Weaver received his injuries, he resided at 649 East Two Hundred and Twentieth street, borough of The Bronx, city of New York, and was employed as a teamster by C. W. Morgan who was engaged in the cooperage business and in connection therewith the operation of a horse truck.

On said date while working for his employer and while driving his employer's team along West street, borough of Manhattan, city of New York, a wheel of his truck went into a hole in the

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asphalt pavement, which hole was about eighteen inches in diameter and from three to six inches in depth, and William Weaver was thereby thrown from his seat on to the pavement of the street, thereby receiving concussion of the brain, causing him to be disabled from working from the date of the accident to the 16th day of June, 1916, and on that date he was still disabled.

The average wage of William Weaver was the sum of thirteen dollars and forty-six cents.

Award of compensation is hereby made against C. W. Morgan, employer, and London Guarantee and Accident Company, insurance carrier, to William Weaver, injured employee, at the rate of eight dollars and ninety-seven cents weekly for a period of nine weeks from April 14, 1916, to June 16, 1916, and this claim is hereby continued for further hearing.

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In the Matter of the Claim of EDNA SAENGER, for Compensation under the Workmen's Compensation Law, against FELIX A. LOCKE, Employer; ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY, Insurance Carrier

Claim No. 36393

(Decided June 15, 1916)

Injuries received by Edna Saenger while employed as a millinery worker by Felix A. Locke.

On February 11, 1916, Edna Saenger, while employed in the millinery workroom of Felix A. Locke, who was conducting a millinery business in the borough of Manhattan, city of New York, was talking about a business matter with a trimmer when her employer told her to get to work and quit talking. She told him she was talking about business and asked him to keep quiet. He then threatened that unless she stopped talking he would send her to the other end of the room whereupon she fainted. Two other employees went for water and ammonia; the glasses became mixed and instead of the water, the ammonia was thrown into Miss Saenger's face resulting in severe burns and an ulcer of the left eye from which claimant was disabled from working until June 16, 1916, a period of eighteen weeks and on that date was still disabled. Her average weekly wage was the sum of eight dollars and sixty-three cents. An award was made.

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Robert W. Bonyng, Chief Counsel to State Industrial Commission.

Alfred W. Andrews, attorney for employer and insurance carrier.

BY THE COMMISSION.— All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award as follows:

On February 11, 1916, the day when Edna Saenger received her injuries, she resided at 211 West One Hundred and Fortieth street, borough of Manhattan, city of New York, and was employed as a worker in the millinery workroom of Felix A. Locke who was in the millinery business and the making of hats and feathers, with a plant and place of business at 21 West Thirty-fourth street, borough of Manhattan, city of New York.

On said date while working for her employer at her employer's plant, Edna Saenger was told by her boss to stop talking and go about her work. She had just seen on a person in the street a hat which had been made by the head trimmer of her employer and was at that time telling the trimmer how well the hat looked. Consequently, she replied to her boss that she was talking business and asked him to keep quiet. He told her to stop talking and said he would send her to the other end of the room which made her nervous and hysterical and she fainted. Two of the young women employees rushed to get some water and ammonia. One brought back some water and one brought back a glass of ammonia; in some way these glasses became mixed and the ammonia was thrown into the face of Edna Saenger, causing burns of her lips, tongue and of the lining of the lid of the eye, and a traumatic ulcer of the left cornea due to the ammonia solution, by reason of which injuries Edna Saenger was disabled from working to June 16, 1916, a period of eighteen weeks, and on that date she was still disabled.

The average weekly wage of Miss Saenger was the sum of eight dollars and sixty-three cents.

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Award of compensation is hereby made against Felix A. Locke, employer, and Zurich General Accident and Liability Insurance Company, insurance carrier, to Edna Saenger, injured employee, at the rate of five dollars and seventy-seven cents weekly for a period of sixteen weeks from February 25, 1916, to June 16, 1916, and the claim is hereby continued for further hearing.

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In the Matter of the Claim of FRANCIS P. SMITH, for Compensation under the Workmen's Compensation Law, against ASTORIA MARBLE SAWING MILLS, Employer; STANDARD ACCIDENT INSURANCE COMPANY of Detroit, Mich., Insurance Carrier

Claim No. 36183

(Decided June 16, 1916)

Injuries received by Francis P. Smith while employed as an engineer in the Astoria Marble Sawing Mills at Astoria, Queens county, N. Y.

On November 4, 1915, Francis P. Smith, while employed as an engineer in the Astoria Marble Sawing Mills, in operating an engine, attempted to push a steam hook on the engine, but in so doing caught one of his fingers in the hook, resulting in a partial loss of the use of that finger. His average weekly wage was the sum of twenty-eight dollars and eighty-five cents. An award was made.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

William A. James, Jr., attorney for employer and insurance carrier.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award as follows:

On November 4, 1915, the day when Francis P. Smith received his injuries, he resided at 16 Thirty-fifth street, Corona, L. I., and was employed as an engineer in the factory of Astoria Marble Sawing Mills, a corporation engaged in the business of sawing

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marble, with a plant and place of business at 63 Mill street. Astoria, Queens county, N. Y.

On said date while Francis P. Smith was working for his employer at his employer's plant and was operating an engine, he attempted to push into place a steam hook on the engine which became misplaced and the second finger of his right hand became caught in the hook, and he thereby received a compound comminuted fracture of the first phalange of the middle finger of the right hand and as a result of this injury a fibrous ankylosis set in, resulting in partial immobility at the distal phalangeal joint and a consequent loss of use of that joint, equivalent of the loss of one-half the finger.

Francis P. Smith continued to work up to February 15, 1916, and received his full wages up to that date. The reason for his ceasing to work on that date is not known.

The average weekly wage of Francis P. Smith was the sum of twenty-eight dollars and eighty-five cents.

Award of compensation is hereby made against Astoria Marble Sawing Mills, employer, and Standard Accident Insurance Company of Detroit, Mich., insurance carrier, to Francis P. Smith, injured employee, at the rate of fifteen dollars and fifty-eight cents weekly for a period of fifteen weeks from November 4, 1915, for the equivalent of the loss of one-half of the second finger of his right hand.

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In the Matter of the Claim of MILLISSA TOTTEN, for Compensation under the Workmen's Compensation Law, for the Death of WILLIAM D. TOTTEN, against DAVID IRISH, Alleged Employer; ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier

Claim No. 393

(Decided June 19, 1916)

Injuries received by William D. Totten, resulting in his death, while it is alleged he was employed as a truck driver by David Irish.

On January 12, 1915, William D. Totten was alleged to have been employed by David J. Irish as a truck driver at Yorktown, N. Y. His employer on that date had expected to haul telephone poles, but, they



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not arriving, there was nothing for Totten to do, and Irish paid him his day's wages and was asked by Totten for permission to use the team to haul a load of wood to the Totten home. While Totten was driving toward his own home with the wood, the horse ran away, and he was thrown from the wagon, sustaining injuries which developed into paralysis, from which he died on November 9, 1915. His average weekly wage was the sum of ten dollars and fifty cents. Award denied.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

Purdy, Strohsall & Kelly, attorneys for claimant.

T. C. Jones, attorney for employer and insurance carrier.

By THE COMMISSION.— All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award as follows:

On November 1, 1915, the day when William D. Totten received his injuries, he resided at Yorktown Heights, N. Y., and was employed as a driver of a truck by David J. Irish who was in the general trucking business at Yorktown, N. Y.

On said date David J. Irish was expecting to haul some telephone poles for a customer but as the poles did not arrive on the cars that day, he had nothing for William D. Totten to do. He paid Totten his day's wages, namely, one dollar and seventy-five cents and then Totten asked Irish if he (Totten) could use the team to haul a load of wood to his own home (Totten's home). Irish said he could and while Totten was driving the team towards his own home with his load of wood, the horse ran away and Totten was thrown from the wagon, receiving a fracture of the fourth cervical vertebrae which developed into general paralysis from which William D. Totten died on November 9, 1915. It was customary for Irish to allow his teamsters to use his teams for their own purposes and to charge therefor fifty cents an hour for the use of the team. In this instance the fifty cents was paid by Totten's wife after his death.

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The average weekly wage of William D. Totten was the sum of ten dollars and fifty cents.

William D. Totten left him surviving his widow, Millissa Totten, aged fifty-two years, the claimant herein, and no child or children under the age of eighteen years.

William D. Totten was not an employee of David Irish at the time of the accident which resulted in his death.

The claim for compensation made by Millissa Totten, the widow of William D. Totten, deceased employee, against David Irish, alleged employer, and Aetna Life Insurance Company, insurance carrier, is hereby denied on the ground that at the time of the accident which resulted in the death of William D. Totten, William D. Totten was not an employee of David J. Irish.

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In the Matter of the Claim of M. EUGENE GALLAGHER, for Compensation under the Workmen's Compensation Law, against  
NEW YORK CENTRAL RAILROAD COMPANY, Employer

Claim No. 16327

(Decided June 20, 1916)

Injuries received by M. Eugene Gallagher while employed by the New York Central Railroad in removing an old cable from the railroad's premises.

On December 5, 1915, while M. Eugene Gallagher was employed by the New York Central Railroad Company in assisting to remove from the company's premises an old cable, he caught one of his fingers, which ultimately became stiffened. The only question involved is whether the railroad company or the Western Union Telegraph Company shall pay the compensation. An award was made.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

O. G. Browne, attorney for employer.

LYON, Commissioner.—The claimant, on December 5, 1915, cut his finger while cutting marline from an old cable which he was assisting to remove on the premises of the railroad company.

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The finger subsequently became stiffened as a result of the accident. There is no question but that claimant is entitled to compensation, and little doubt but that he has lost the use of the finger. The only question seriously raised is, who shall pay the compensation.

The railroad company insists that by the terms of a contract dated June 1, 1907, running to January 1, 1936, made between the railroad company on the one hand and the Western Union Telegraph Company and the Great Northwestern Telegraph Company on the other, the burden of compensation in this case must be borne by the Western Union Telegraph Company. The contract in question provides for joint use by the two companies, upon the lands of the railroad company of poles and wires, some owned by one company and some by the other, and for maintenance and repairs of the same, with proper stipulations as to expense of maintenance and damages for injuries to workmen and others.

It may be that under the terms of this contract the ultimate burden of compensation in this case must fall upon the telegraph company. In fact I am inclined to think it must. But that is not to say that the burden of having that question decided must be borne by this claimant if, as I think, he has a perfectly clear right to compensation against the railroad company.

Gallagher was on the payroll of the railroad company. He worked on the premises of the railroad company, doing work which was, in part at least, for the interest of the railroad company and under a foreman who was also paid by, and who reported to the railroad company. There is no evidence that Gallagher ever heard of the contract in question, and it is not probable that he would have known what it meant if he had seen it. That he looked upon the railroad company as his employer is shown by the fact that he has made his claim against that company alone. If it were a question of recovering his wages, there is no doubt but he could hold the railroad company and I think that compensation follows the same route.

It is quite possible that if he had made claim against the telegraph company, he could sustain it under the terms of the contract, but he should not be compelled to have recourse to a company

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as his employer, of whose relation to his work, so far as the evidence shows, he had no knowledge.

I advise an award against the railroad company, the only company in fact before the Commission.

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In the Matter of the Claim of WILLIAM SCHWEIZER, for Compensation under the Workmen's Compensation Law, against JOHN SCHREINER, Employer; GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, Insurance Carrier, and FIDELITY AND CASUALTY COMPANY of New York, Alleged Insurance Carrier

Claim No. 35585

(Decided June 21, 1916)

Injuries received by William Schweizer while employed as a janitor by John Schreiner.

On February 28, 1916, William Schweizer, while employed as a janitor and superintendent by John Schreiner, a real estate operator in the city of New York, was attempting to fix a broken water gauge on a boiler of which his employer had charge, and while repairing the gauge the glass broke and injured part of the fingers of his right hand, infection resulted, necessitating bone removal and the consequent loss of the use of one of his fingers. His average weekly wage was the sum of twenty-three dollars. An award was made.

Robert W. Bonyng, Chief Counsel to State Industrial Commission.

James F. McMahon, attorney for General Accident Fire and Life Assurance Corporation, insurance carrier.

Charles W. Gray, attorney for Fidelity and Casualty Company of New York, insurance carrier.

BY THE COMMISSION.—It was claimed by the General Accident Fire and Life Assurance Corporation that the Fidelity and Casualty Company of New York was also the insurance carrier. In this case and thereupon the Fidelity and Casualty Company of New York was made a party to this proceeding and appeared herein.

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All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, award and decision as follows:

On February 28, 1916, the day when William Schweizer received his injuries, he resided at 2410-12 Seventh avenue, borough of Manhattan, city of New York, and was employed as a janitor and superintendent by John Schreiner who was in the real estate business in the borough of Manhattan, city of New York, and in connection with that business operated among others, two apartment houses, one situated at 164 West One Hundred and Forty-first street, and the other at 2410-12 Seventh avenue, in the borough of Manhattan, city of New York. 2410-12 Seventh avenue is at the corner of Seventh avenue and One Hundred and Forty-first street and 164 West One Hundred and Forty-first street is on One Hundred and Forty-first street, between Seventh and Lenox avenues, the next highway east. William Schweizer was employed particularly in respect of 2410 Seventh avenue and lived on those premises, and his duties embraced, among other things, the operation of the boiler in these premises.

On said date John Schreiner ordered William Schweizer to go to the premises 164 West One Hundred and Forty-first street to fix a broken water gauge on the boiler at that place, which boiler was used in respect of 164 West One Hundred and Forty-first street only. William Schweizer went to that place and started to repair the gauge, and while doing so the glass broke and severed the extensor tendons of two fingers of his right hand, the cut being across the tendons over the middle knuckles of those fingers. On the third day after the accident an infection set in in the index finger and an operation was later performed, at which operation it was discovered that there was a bone infection and a piece of bone was necessarily cut out from the second phalange, resulting in the permanent immobility of the index finger and the consequent permanent loss of use of that finger. By reason of the injury to the second finger William Schweizer would have been disabled for a period of six weeks from the date of the accident if the injury to the first finger had not existed.

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The average weekly wage of William Schweizer was the sum of twenty-three dollars.

Due notice of injury was given by the employee to the employer.

The General Accident Fire and Life Insurance Corporation, Limited, issued to John Schreiner a policy of insurance for the payment of compensation under the Workmen's Compensation Law in respect of all employees engaged in the care, custody and maintenance of the premises 164 West One Hundred and Forty-first street, borough of Manhattan, which are the premises at which the accident happened. That policy also embraced premises at 508 West Eighty-fourth street, 2409-11 Seventh avenue, and 1862-66 Third avenue, borough of Manhattan, city of New York, but did not embrace specifically the premises 2410-12 Seventh avenue. This policy was in effect at the time of the accident. The Fidelity and Casualty Company of New York issued to John Schreiner its policy for the payment of compensation under the Workmen's Compensation Law, in which policy the location of the premises indicated in the policy is 2410-12 Seventh avenue, borough of Manhattan, city of New York. Each of said policies contain in its declarations the estimated payroll of employees of the respective premises. Each policy called for an estimated advance premium. Each policy contained a condition that if the earned premium shall be later computed to be greater than the advance estimated premium, the employer shall pay to the insurance company the additional premium. Neither the State Workmen's Compensation Commission nor the State Industrial Commission, its successor, has adopted any rule permitting an insurance company to issue a policy limited to particular premises. In each policy there is a declaration stating the location of the buildings to which the respective policies applied and these buildings were stated in the respective policies as above designated.

William Schweizer was injured in the premises specifically designated in the policy of the General Accident Fire and Life Assurance Corporation, Limited, and his regular employment was in the premises designated in the policy of the Fidelity and Casualty Company of New York.

Award of compensation is hereby made against John Schreiner,

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employer, and General Accident Fire and Life Assurance Corporation, Limited, to William Schweizer, injured employee, at the rate of fifteen dollars weekly for a period of four weeks, beginning March 13, 1916, for disability arising through the injury to the second finger of his right hand; and for the further and subsequent period of forty-six weeks for the equivalent of the loss of the index finger of the right hand.

The Fidelity and Casualty Company of New York is not the insurance carrier of John Schreiner in respect of the said accident to William Schweizer.

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In the Matter of the Claim of ADOLPH LANDES, for Compensation Under the Workmen's Compensation Law, against DAVID LUPTON'S SONS COMPANY, Employer; ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier

Claim No. 27039

(Decided June 28, 1916)

**Injuries received by Adolph Landes while employed as an iron worker's helper by David Lupton's Sons Company.**

On December 10, 1915, Adolph Landes, while employed as an iron worker's helper by David Lupton's Sons Company on some construction work at Edgewater, N. J., on premises owned by the American Can Company, was at work on a ladder when some one pushed the ladder and he fell therefrom and sustained a fracture of the left arm at the elbow joint, whereby he was disabled from working until June 2, 1916, and on that date he was still disabled. His average weekly wage was the sum of twenty dollars and nineteen cents. An award was made.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

James E. Heaney, attorney for employer and insurance carrier.

Mr. Schilling for claimant.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commis-

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sion makes its conclusions of fact, ruling of law, and award as follows:

On December 10, 1915, the day when Adolph Landes received his injuries, he resided at 134 Orchard street, borough of Manhattan, city of New York, and was employed as an iron worker's helper by David Lupton's Sons Company, a Pennsylvania corporation engaged in the business of structural iron work with its principal office and place of business at Philadelphia, Penn. The said employer also has an office at 50 Church street, borough of Manhattan, city of New York.

On said date David Lupton's Sons Company were performing some construction work for the American Can Company at Edgewater, N. J. Being in need of some men, three days prior to that date, one Mr. Groh, the superintendent of David Lupton's Sons Company in the office at 50 Church street, New York city, telephoned to one Shilling, the secretary and treasurer of the United Housesmith's and Bronze Erectors of New York and Vicinity, which had an office at 201 East Forty-fourth Street, New York city, asking Mr. Shilling to send ten men to Edgewater, N. J., for the purpose of going to work on the said building. Shilling was also authorized to agree with the men to pay them for two hours' time in case they should arrive at Edgewater and be rejected by their employer. Pursuant to these instructions Shilling engaged Landes in New York. The contract of employment was entered into in New York State but was subject to being terminated by the employer in New Jersey in case the men should not prove satisfactory upon payment to the men of two hours' time. Adolph Landes proceeded to Edgewater and started on the work and was not rejected by the employer. On December 10, 1915, at about 1.05 p. m., while he was working on a ladder at the site of the construction work, some one pushed the ladder and he and two other men fell from the ladder and Landes received thereby a fracture of the lower end of the left arm at the elbow joint, by reason of which injury Landes was disabled from working from the date thereof to June 2, 1916, and on that date was still disabled.



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The average weekly wage of Adolph Landes was the sum of twenty dollars and nineteen cents.

Award of compensation is hereby made against David Lupton's Sons Company, employer, and Ætna Life Insurance Company, insurance carrier, to Adolph Landes, injured employee, at the rate of thirteen dollars and forty-six cents weekly for a period of twenty-three weeks, from December 24, 1915, to June 2, 1916, and this claim is hereby continued for further hearing.

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In the Matter of the Claim of LAWRENCE E. LOFTIS, for Compensation under the Workmen's Compensation Law, against REMINGTON ARMS AND AMMUNITION COMPANY, Employer; LONDON GUARANTEE AND ACCIDENT COMPANY, Insurance Carrier

Claim No. 57854

(Decided June 28, 1916)

Injuries received by Lawrence E. Loftis while employed as an electrical machine operator by Remington Arms and Ammunition Company.

On January 25, 1915, Lawrence E. Loftis, while employed as an electrical machine operator by the Remington Arms and Ammunition Company at Ilion, N. Y., was adjusting a machine which was in operation when his right hand caught in the knives of the machine resulting in the loss of portions of several fingers, causing permanent loss of the use of that hand. His average weekly wage was the sum of seventeen dollars and sixty-five cents. An award was made.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

William Butler, attorney for employer and insurance carrier.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award as follows:

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On January 25, 1916, the day when Lawrence E. Loftis received his injuries, he resided at East Frankfort, and was employed as an electrical machine operator by Remington Arms and Ammunition Company, a corporation engaged in the business of manufacturing small fire arms with a plant and place of business on East Main street, Ilion, N. Y.

On said date while Lawrence E. Loftis was working for his employer at his employer's plant, and was engaged in adjusting a machine while the machine was in operation, his right hand was caught in the knives of the machine, causing an amputation of part of the thumb, and of part of each of the fingers of the right hand, which injuries have caused a permanent loss of use of that hand.

The average weekly wage of Lawrence E. Loftis was the sum of seventeen dollars and sixty-five cents.

Award of compensation is hereby made against Remington Arms and Ammunition Company, employer, and London Guarantee and Accident Company, insurance carrier, to Lawrence E. Loftis, injured employee, at the rate of eleven dollars and seventy-seven cents weekly for a period of 244 weeks from January 25, 1916, for the equivalent of the loss of the right hand.

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In the Matter of the Claim of SAMUEL UNGAR, for Compensation under the Workmen's Compensation Law, against SUPREME REALTY COMPANY, Employer; ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY, Insurance Carrier

Claim No. 335

(Decided June 28, 1916)

Injuries received by Samuel Ungar while employed as a superintendent of an apartment house operated by the Supreme Realty Company.

On December 30, 1915, Samuel Ungar, while employed as a superintendent of an apartment house operated by the Supreme Realty Company, was fixing a radiator for one of the tenants in a bedroom of the tenant's apartment. While using a Stilson wrench to tighten the valve the wrench slipped and struck him in the left groin causing an injury

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which disabled him from working until February 16, 1916. His average weekly wage was the sum of twelve dollars and seventy-seven cents. An award was made.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

Alfred W. Andrews, attorney for employer and insurance carrier.

By THE COMMISSION.—All the evidence admitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award, as follows:

On December 30, 1915, the day when Samuel Unger received his injuries, he resided at 509 West One Hundred and Thirty-second street, borough of Manhattan, city of New York, and was employed as the superintendent of an apartment house operated by Supreme Realty Company, a corporation engaged in the real estate business and in connection therewith, the operation of apartment houses. The duties of Samuel Unger were to attend to the boiler and the steam service and to make such small repairs to the plumbing of the building as were necessary and as were within his capabilities, he being a plumber by trade.

On said date, while working for his employer at said premises, he was called upon by one of the tenants to fix a radiator in the bedroom of one of the tenants' apartment. He went to the room and found that a valve was leaking and started to use a Stilson wrench in order to tighten the valve and the wrench slipped and struck him in the left testicle, causing an injury which disabled him from working from the date of the accident until the 16th day of February, 1916, a period of seven weeks.

Award of compensation is hereby made against Supreme Realty Company, employer, and Zurich General Accident and Liability Insurance Company, insurance carrier, to Samuel Unger, injured employee, at the rate of eight dollars and fifty-one cents weekly for a period of five weeks from January 13, 1916, to February 16, 1916.

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In the Matter of the Claim of FRANK SICARDI, for Compensation under the Workmen's Compensation Law, against SARNOFF HAT COMPANY, INC., Employer; ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY, Insurance Carrier

Claim No. 35467

(Decided July 6, 1916)

Injuries received by Frank Sicardi while employed as a finisher by Sarnoff Hat Company, Inc.

On November 4, 1915, while Frank Sicardi was employed as a finisher by Sarnoff Hat Company in the city of New York, he was passing along the third floor of the factory when a splinter from the floor went through his shoe and into his right foot. Sicardi left work for nine days and then returned and worked until March 1, 1916. The next day he went to the hospital and was operated on and the splinter was drawn from his foot. He returned to work March 29th, but on May 1, 1916, was again operated on for the same injury and did not return to work until May 29, 1916. His average weekly wage was the sum of thirty-four dollars and sixty-one cents. An award was made.

Robert W. Bonyng, Chief Counsel to State Industrial Commission.

Alfred W. Andrews, attorney for employer and insurance carrier.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award as follows:

On November 4, 1915, the day when Frank Sicardi received his injuries, he resided at 95 Hamburg avenue, borough of Brooklyn, city of New York, and was employed as a finisher by Sarnoff Hat Company, Inc., a corporation engaged in the business of manufacturing men's soft hats, with a plant at 140 East Fourteenth street, borough of Manhattan, city of New York.

On said date while Frank Sicardi was working for his employer and while passing along the third floor of the factory, a piece of splinter from the floor went through his shoe and into his right foot. By reason of this accident Sicardi laid off from work for

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nine days until November thirteenth, and then returned to work and worked to and including March 1, 1916. On March 2, 1916, he went to the hospital and was operated on and the splinter was withdrawn from his foot, and he was not able to return to work until March 28, 1916. He then continued working until the 1st day of May, 1916, when he had another operation for the same injury and was disabled from working until May 29, 1916. The claimant failed to give a written notice of his injury to his employer within ten days thereof for the reason that he did not consider his injury very serious and it was not until March 2, 1916, when he went to the hospital, that he gave notice of injury to his employer pursuant to the statute. His failure to give notice of injury within the statutory period did not prejudice the employer.

The average weekly wage of Frank Sicaidi was the sum of thirty-four dollars and sixty-one cents.

Award of compensation is hereby made against Sarnoff Hat Company, Inc., employer, and Zurich General Accident and Liability Insurance Comptny, insurance carrier, to Frank Sicardi, injured employee, at the rate of fifteen dollars weekly for a period of seven and one-half weeks, being the periods from March 4, 1916, to March 29, 1916, and from May 1, 1916, to May 29, 1916, and the failure of Frank Sicardi to give statutory notice of injury to his employer is hereby excused on the ground that such failure did not prejudice his employer.

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**In the Matter of the Claim of AL ANDERSON, for Compensation under the Workmen's Compensation Law, against E. F. SMITH & SONS COMPANY, Employer; MANUFACTURERS' LIABILITY INSURANCE COMPANY OF NEW JERSEY, Insurance Carrier**

Claim No. 22882

(Decided July 10, 1916)

**Injuries received by Al Anderson while employed as a longshoreman by E. F. Smith & Sons Company.**

On September 23, 1915, while Al Anderson was employed as a longshoreman by E. F. Smith & Sons Company, was at work on Pier 33

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in New York city when he slipped while pushing a truck on the pier and both of his shins struck the truck, thereby receiving bruises and injuries which disabled him from work until October 28, 1915. His average weekly wage was the sum of twenty-three dollars and eight cents. An award was made.

Robert W. Bonyng, Chief Counsel to State Industrial Commission.

Albert Van Winckle, attorney for employer and insurance carrier.

**BY THE COMMISSION.**—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, award and decision as follows:

On September 23, 1915, the day when Al Anderson received his injuries, he resided at 443 West Sixteenth street, borough of Manhattan, city of New York, and was employed as a longshoreman by E. F. Smith & Sons Company, a corporation engaged in the business of stevedores with an office at 116 Broad street, borough of Manhattan, city of New York.

On said date while Al Anderson was working for his employer at Pier 33 in the borough of Brooklyn, city of New York, where his employer was doing some stevedore work in connection with a steamship then moored to the pier, he slipped while pushing a truck on the pier and both of his shins struck the truck, thereby receiving bruises and injuries to the shins which disabled him from working from the date of the accident until October 28, 1915, a period of five weeks.

Al Anderson was employed to work at night at the rate of fifty cents an hour on the basis of ten hours counting a day's work. The average weekly wage of Al Anderson for the purposes of the Compensation Law was the sum of twenty-three dollars and eight cents.

Award of compensation is hereby made against E. F. Smith & Sons Company, employer, and Manufacturers' Liability Insurance Company, insurance carrier, at the rate of fifteen dollars weekly for a period of three weeks from October 7 to October 28, 1916.

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In the Matter of the Claim of **TILLIE ADLER** and Minor Children,  
for Compensation under the Workmen's Compensation Law for  
the Death of **SAMUEL ADLER**, against **THOMASHEFSKY THEATRE  
COMPANY, INC.**, Employer; **LONDON GUARANTEE AND ACCI-  
DENT COMPANY**, Insurance Carrier

Claim No. 52437

(Decided July 11, 1916)

**Rehearing granted in the matter of injuries received by Samuel Adler, result-  
ing in his death, while employed by the Thomashefsky Theatre Company,  
Inc.**

On January 15, 1915, Samuel Adler, while employed as a property man and stage carpenter by the Thomashefsky Theatre Company, Inc. in New York city, was putting chairs through a trap door in the floor of the stage to the room below. He lost his balance and fell through the trap door, fracturing his skull and died at the Bellevus Hospital the same day. This claim was originally dismissed by the Commission as the result of a hearing held March 19, 1915, on the ground that neither the employer nor the employee was engaged in a hazardous occupation. Subsequently a court action was brought against the employer, but was dismissed upon trial, and appeal was taken therefrom and is now pending. The Commission denied an application to reverse the decision made by it, its refusal being based upon the grounds stated.

**Robert W. Bonynge**, Chief Counsel to State Industrial Commission.

**Joseph A. Seidman**, attorney for claimant.

**William Butler**, attorney for employer and insurance carrier.

**LYON**, Commissioner.— Claim is made for compensation growing out of the death of Samuel Adler on the 15th day of January, 1915. Mr. Adler was employed by the theatre company as property man. On the day of his accident there had been a performance at the theatre and Mr. Adler, assisted by others, as his custom was, was removing some of the stage furniture through a trap door in the floor of the stage to the room below. In some way he lost his balance or made a misstep and fell through the

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opening in the floor of the stage, causing injuries from which he died. A claim was duly filed for compensation and came on for hearing before the Workmens' Compensation Commission, the predecessor of the present Industrial Commission, on March 19, 1915, and was there denied. One of the Commissioners there, stated, "I would say that my reason for voting 'no' is that this theatrical business does not come under the Law. If this man had been injured doing carpenter work at the particular moment he met with the accident, it would be a different matter. I feel it is a good deal like these janitor cases." Thereafter an action was brought at common law for damages growing out of negligence which was subsequently dismissed on trial and an appeal from that judgment is now pending. The application is now made for a rehearing in order to secure, if possible, a reversal of the decision of the former Commission, and such a hearing has been had and some additional testimony taken. The questions to be determined are, whether this Commission, ought, after so long a time and after the attempt to enforce the claimant's right at common law to review the decision of the former Commission, and if so, whether the present Commission will take a different view of the matter than that taken by its predecessor.

I have very serious doubts whether a decision rendered considerably more than a year ago by a Commission whose personnel is different from that of the present Commission ought to be disturbed, especially in view of the fact that the claimant apparently acquiesced in that decision and attempted to enforce her rights at common law, on the theory that the decision of the Workmen's Compensation Commission was correct. In any event I am of the opinion that we ought not to reverse the decision of the former Commission under the circumstances, unless the case as now made is very clear showing that a grave injustice has been done. I am unable to see that such a clear case has been made out. The decisions rendered by the Appellate Division of the Supreme Court since the award in this case was denied by the Workmen's Compensation Commission, seem to me to thoroughly substantiate the reason given for the former Commission's decision, already



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quoted. It seems to me that in order to make an award in this case, it would be necessary for us to find that the principal business of this theatre company was structural carpentry or the manufacture of furniture. The courts have held that where the principal business of the employer is not under the act, an injured employee cannot be held entitled to compensation though his own business is under one of the hazardous groups, unless he is injured while actually performing a portion of the duties of that hazardous group. It is strongly urged by the attorney for the claimant that Mr. Adler was a carpenter or a manufacturer of furniture and so would come under either group 16, "manufacture of furniture" or under group 42, "structural carpentry." It seems that Mr. Adler's principal duty was to take charge of the various pieces of property used in this theatre, see to its proper storage, assist in bringing it to its position on the stage and returning it to the storage room when no longer required, and in addition, make such repairs as become necessary from time to time, and fashion and construct articles to represent furniture of former periods.

I am not convinced that Mr. Adler's business could, under the circumstances, be said to be either structural carpentry or the manufacture of furniture, but be that as it may it is very clear to me that the business of his employer was neither the manufacture of the furniture nor structural carpentry, and under the decision in the case of *Bargey v. Massaro Macaroni Company*, he would not be entitled to compensation even though he were found by us to be a structural carpenter or a manufacturer of furniture. Judge Kellogg writing for the Appellate Division in the *Bargey* case, said, in speaking of the injured workman, "He was a general carpenter, doing such work as he was called upon to do for different people, usually by the hour, but sometimes took jobs. He was not in the general employ of the company, but was the man it usually employed to do little odd jobs about the building. He never did any work in the Macaroni business; his only work for the defendant was doing work upon or about its buildings. I do not think he was an employee in a business declared hazardous by

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the Workmen's Compensation Law. Clearly he was not engaged in the Macaroni business, but his sole business was a carpenter. The company was not carrying on the carpenter business, or doing any carpenter work for a profit, it was making repairs and improvements upon its real estate and hired a general worker for that purpose. If a man in a business not hazardous employs a carpenter to do some work upon his property, like fixing a window or a door, I do not think the person performing the work is an employee engaged in the hazardous business of structural carpentry."

If it should be held that the business of the employer in this case was divided into two or three separate employments, for instance, the running of a theatre, structural carpentry and the building of furniture, still, under the reasoning in the case of *Sickles v. Ballston Storage Company*, 156 N. Y. Supp. 864, the claimant could not be allowed compensation. Mr. Adler certainly at the time of his injury was neither engaged in structural carpentry nor in the manufacture of furniture. He had been engaged in neither of these kinds of work on the day when he was injured. Indeed it is doubtful whether he had done anything in either of these lines for four days before the accident. It cannot be said that the moving of the article which was being handled when the accident occurred, was incident to the manufacture of furniture or structural carpentry, for it does not appear that he ever did any work on the canopy being moved and it was simply being lowered to the store room after it had been used in a theatrical performance. I advise that the application to reverse the award of the Workmen's Compensation Commission and make an award, be denied.

Commissioner Mitchell dissenting.

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In the Matter of the Claim of CHARLES McNALLY, for Compensation under the Workmen's Compensation Law, against DIAMOND MILLS PAPER COMPANY, Employer; EMPLOYERS' MUTUAL INSURANCE COMPANY, Insurance Carrier

Case No. 61362

(Decided July 11, 1916)

Rehearing in the matter of injuries received by Charles McNally while employed by the Diamond Mills Paper Company at Saugerties, N. Y.

This claim was heard originally on November 10, 1915, December 6, 1915, and December 14, 1915, at which times various awards were made. Subsequently, and on April 4, 1916, the previous awards were rescinded and the claim denied. A rehearing was had on May 5, 11 and 26, 1916, and upon further evidence the former action of the Commission rescinding the award was reversed and the claim was allowed.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

John N. Carlisle and F. E. W. Darrow, attorneys for claimant.

Maurice J. O'Callaghan, attorney for insurance carrier.

LYON, Commissioner.—An award in this case was denied on April 4, 1916, on the ground that claimant was an independent contractor. See the Bulletin, Vol. 1, No. 7, p. 8. Pending an application for a rehearing and in order to preserve claimant's right for review by the court, an appeal was taken which is now pending.

Claimant had no counsel up to the time when the award was denied and he now asks a rehearing in order to introduce further testimony as to his employment. Hearing has been had and testimony offered and two questions are presented.

*First.* Shall the case be reopened and the testimony received, and if so

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*Second.* Does the testimony now show that McNally was, at the time of his injury, an employee of the Diamond Mills Paper Company, within the meaning of the Workmen's Compensation Law?

The Commission has taken the ground that the intention of the legislature in enacting the Compensation Law was to give an injured workman, in an ordinary case, his compensation without the necessity of employing a lawyer, and has emphasized this position by uniformly allowing very low fees to such attorneys as appear before it, for injured workmen. Where a close case, like the present one, has been decided against the workmen who has adopted the Commission's idea and appeared without an attorney, the Commission feels that it should be much more lenient with the injured workman whose case has not been presented in the best manner, than it would if a like application were presented by an insurance carrier who had been represented by a lawyer or by a trained adjuster. The new testimony ought in my opinion, to be received, if the statute will permit it.

The insurance carrier claims that the Commission is ousted of jurisdiction by the appeal which has been taken. The carrier admits that section 74 gives the Commission jurisdiction to rehear a case at any time before an appeal is taken. In my opinion the "continuing" jurisdiction given the Commission by section 74 of this act is not cut off by an appeal. The act intends that hearings before the Commission should be quite informal and specifically provides that the Commission shall not be bound by technical rules of procedure. The cases before the Commission are so numerous that rehearings often could not be had and decisions rendered until after the time to appeal has expired, and injustice would frequently be done to injured workmen, who have their cases heard without the aid of counsel, if they could not preserve their right by a notice of appeal while their application for a rehearing is pending.

It remains to determine whether the new testimony introduced is such as to satisfy the Commission that Mr. McNally was an employee of the Diamond Mills Paper Company instead of an

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independent contractor. There can be no doubt that a man who is carrying on a separate business and who would ordinarily be an independent contractor, when working for another, may, under certain circumstances throw off his character of independent contractor and assume for the time being the position of an ordinary employee. In the former opinion written in this case it was said: "the only direction which Mr. McNally claims he received from anybody connected with the Diamond Mills Paper Company was the direction of one Wright who is claimed to have been not in the employ of the Diamond Mills Paper Company, but in the employ of the Company from which the engine, which was being moved, was purchased, that Company having apparently sent down one of its experts to oversee the installation of the engine. It is claimed that the case is covered in this feature of it by the case of *Rheinwald v. Builders' Brick & Supply Company*. There is nothing in the case to show that Mr. Wright either had the right or attempted to exercise any control over the manner in which McNally and his assistants performed the work."

On the last hearing the contract between the Diamond Mills Paper Company and the Erie City Iron Works, the maker of the engine which was being installed, was offered in evidence and the following is a quotation from that contract: "Price, Seven Thousand Seven Hundred and Sixty-Four Dollars — \$7,764.00 — f. o. b. Erie, Pa., less freight allowed to Saugerties, N. Y. Erecting Engineer's services will be furnished at the rate of \$7.00 per day and expenses, to superintend installation." Mr. Wright was the person furnished by the Erie City Iron Works to superintend the erection of this engine and he was to be paid by the Diamond Mills Paper Company, seven dollars per day. He is the man who by agreement of all parties had the general supervision and control of what was done about installing the engine. He was given the right at the time by one in authority in the Paper Mills Company to hire one of the employees, but the Diamond Mills Paper Company paid the wages. While McNally and two of his men came to work under Wright, there were several other men working under him hired and paid by the Diamond Mills Paper Company.

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While there are some features in the case which would naturally accompany a contract made by an independent contractor, such as the hiring of one or two workmen at a different wage than that which McNally received and the carrying of compensation insurance, I am of the opinion that the general power which Wright had, to oversee the whole job, is controlling and places all the men who were working under Wright including McNally, in the category of employees of the Diamond Mills Paper Company.

The bringing over of two men by McNally to assist in the work seems rather to have been a matter of convenience to the paper company, than an arrangement by which McNally could make a profit on their wages, and the carrying of compensation insurance was undoubtedly for the purpose of protecting McNally's men when they did work for him as an independent contractor. McNally exercised no control over the men who are assisting and installing the engine. He neither engaged nor paid any of them except the two already mentioned. The matter of installing the engine was under the immediate direction and control of Wright, who was, as already shown, a superintendent for the paper mills company. I advise that the former decision be rescinded and that an award be made.

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In the Matter of the Claim of MAUD M. HOWARD and Minor Son, for Compensation under the Workmens' Compensation Law, for the Death of CHARLES C. HOWARD, against GEORGE HOWARD, Inc., Employer; MASSACHUSETTS BONDING AND INSURANCE COMPANY, Insurance Carrier

Claim No. 812

(Decided July 11, 1916)

Injuries received by Charles C. Howard, resulting in his death, while employed as a business manager and superintendent by George Howard, Inc.

On January 4, 1916, while Charles C. Howard was employed by George Howard, Inc., as superintendent and business manager, he was installing a skylight on a building owned by the corporation at Mt. Vernon, and while taking measurements stepped upon a plank which

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tilted and precipitated him two stories into the cellar, inflicting injuries resulting in his death that same day. His average weekly wage was the sum of twenty-three dollars and eight cents. An award was made.

Claim is made by Maud M. Howard, widow, on behalf of herself and her son, George M. Howard, aged eleven, for compensation growing out of the death of Charles C. Howard on January 4, 1916. An award was heretofore made, but on application of the insurance carrier and with the assent of the claimant, the case was reopened and further testimony taken and the matter now comes on for a final determination, whether the claim is compensatable or not. It is the claim of the insurance carrier that Charles C. Howard was not an employee of George Howard within the meaning of the Compensation Law, and it relies in support of its contention upon the fact that Charles C. Howard was not carried upon the payroll of George Howard as an employee, that no premium was collected by it upon his salary or wages and that the general course of business for the past several years between Charles C. Howard and George Howard, his father, was such as to warrant the finding that Charles C. Howard was not an employee of his father.

Robert W. Bonyng, Chief Counsel to State Industrial Commission.

J. D. Toomey, attorney for claimant.

A. F. Jacct, attorney for insurance carrier.

LYON, Commissioner.—George Howard a man now about eighty years of age, has been in the general business of dealing in hardware, plumbing, roofing and metal working at Mt. Vernon for nearly half a century. Charles C. Howard, his only son, entered the business many years ago and for a time was carried upon the payroll as an employee. Subsequently, however, when Mr. George Howard, because of his advancing years, wished to withdraw from active management of the business, Charles C. became the manager for his father. He seems to have managed the business, according to his father's admission, much more

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successfully than George Howard himself had done, and George Howard on one of two instances offered to turn over the business to Charles C. This, however, the son refused to allow and the business continued to be carried on under the name of George Howard until after the death of Charles C., after which it was incorporated, and is now being carried on under the name of George Howard, Inc. There was never any agreement between the two Howards relative to the amount of wages which Charles C. should draw, but accounts were kept in which the drawings of Charles C. were regularly charged against him. The business seems to have been very successful and Charles C. drew during the later years large sums of money with the full permission apparently of his father, these sums reaching as high in later years as eight or nine or ten thousand dollars per year. Copies of the income tax returned for both Charles C. and George Howard, for the year ending December 31, 1914, were offered in evidence, from which it appeared that the net income of George Howard for that year was \$13,731.87, and the net income for Charles Howard for the same year was \$11,712.09. Of the income so reported by Charles C. Howard, the sum of \$10,322.08 was by him scheduled under the heading of salary and wages. On schedule of George Howard annexed to said return, the sum of \$9,692.40 is reported as income derived from "business, trade, commerce or sales or dealings in property whether real or personal." During all the later years of the business Charles C. Howard held a full power of attorney from his father George Howard, and seems to have acted in all respects as general manager of the business.

The representative of the insurance carrier who checked up the payroll of George Howard for the purpose of adjusting the premium on the policy of the Massachusetts Bonding and Insurance Company, was called to the stand and testified that the books of George Howard were placed at his disposal for the purpose of checking up the payroll and that Mr. Young, an employee of George Howard gave him a statement of the payroll from the books. This statement did not place Charles C. Howard among the employees of his father, but the question of his status in the



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business was taken up between the two and the representative of the insurance company was fully apprised of the relation which Charles C. Howard bore to the business of George Howard. It was determined by the representative of the insurance carrier on that occasion that George C. Howard should not be included as an employee and that no part of his wages or salary should be made the basis of premium, owing, as he said, to the fact, that he understood that only a portion of Charles C. Howard's time was given to the business. The testimony is, however, that Charles C. Howard gave a great part of his time very sedulously to the business of his father, and only devoted a small portion of his time to public business, he being for a portion of the time, the president of the school board of the town of Mt. Vernon.

The business of George Howard was carried on in a building owned by himself. This building was of considerable size and three stories in height. A portion of the ground floor was occupied by a tenant for a business different from that of George Howard. A portion of the second floor was used for storing surplus merchandise for George Howard and the balance was for rent, and the third floor was entirely rented out to a third party. Charles C. Howard, at the time of the accident which resulted in his death, was overseeing the alterations in this building. He had gone to the roof to take some measurements for the putting in of a scuttle for a skylight when he stepped on a board which was not properly balanced, or in some way, lost his balance and fell through the scuttle to the ground floor, resulting in his death. The alterations which Charles C. Howard was taking the measurements for and was over-seeing, were in direct line with a portion of the regular business of George Howard. A very considerable part of the regular business of the concern was to put in metal parts of roofing and skylight, and he was making repairs to his own building in direct pursuance of his regular business. The building which was being repaired was used partly for business purposes by the owner and partly for the purpose of producing rent, so I think there can be no doubt that the repairs which were going on, were made by George Howard in pursuance of his regular business which was being carried on for pecuniary gain.

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The questions to be determined are whether under all the facts in the case Charles C. Howard was an employee of his father within the meaning of the Compensation Law, and if so, whether the facts that he was not carried on the payroll and that the Massachusetts Bonding Company did not collect a premium upon his salary, precludes the claimant from compensation. I am of the opinion that Charles C. Howard was an employee of his father within the meaning of the Compensation Law. Certainly upon the facts as produced, he had no interest as proprietor in the business which he was over-seeing which could be enforced in an action at law. He had been offered the right to take over the business into his own name, but had refused it. I do not think it could be held that an employee in the business could have recovered his wages against Charles C. Howard in an action at law, nor that the next of kin or personal representative of Charles C. Howard could today collect any interest in the business, nor does such a proceeding ever seem to have occurred either to his widow or his father. The fact that he received no stated salary is a little disturbing but to my mind is not at all controlling. George C. Howard was without other children than this one son. He lived in the family with Charles C. Howard and his wife. The whole matter was no doubt a family arrangements, by which Charles C. Howard was enabled to assist his father, drawing such sums as he needed without any very clear idea in the minds of either as to the real value of his services, the expectation of both being that the matter would adjust itself on the death of George Howard, by reason of the fact that Charles C. would be his only heir at law and next of kin, and this probably would have been the result had Charles C. outlived his father. Had the pleasant relations between the two been broken up, it is my opinion that Charles C. Howard could, under the circumstances, have successfully maintained a suit against his father for his services upon the basis of a *quantum meruit*. There can be no doubt that the services of Charles C. Howard were, in any event, of the value of more than fifteen hundred dollars per year, and inasmuch as the limit of wages for the purposes of compensation is one hundred dollars per month, there can be no question but that the real value

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of his services is sufficient to warrant the limit of compensation, provided by the Compensation Law.

Of course it goes without saying that if the widow of Charles C. Howard is entitled to compensation, the bonding company is entitled and always was entitled to collect a premium upon his salary according to the principles laid down in the Compensation Law. I am unable to see, however, that the employer or the employee are, either one of them, at all at fault if this was not done. The representative of the insurance carrier testified that the question of including or not including Charles C.'s salary in the payroll was never brought to the attention of either Charles C. or George Howard. It is quite evident that all the circumstances were placed before him and if he, or his company, on the facts as presented, made a mistake in checking up the payroll it does not seem to me that the consequences of such an error can be charged up against the claimant in this case. I advise that an award be made.

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In the Matter of the Claim of FANNIE A. UHL, for Compensation under the Workmens' Compensation Law, for the Death of HENRY UHL, against THE HARTWOOD CLUB, Employer; ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier

Claim No. 14487

(Decided July 11, 1916)

Injuries received by Henry Uhl, resulting in his death, while employed as a general utility man by the Hartwood Club.

On January 22, 1916, while Henry Uhl was employed as a utility man and helper by the Hartwood Club, an unincorporated association, owning several thousand acres of land, most of which was woodland, he was engaged in cutting trees on the club property when a tree cut by another employee fell and the upper branches struck Uhl on the head, resulting in fracture of the skull and death. The Hartwood Club, upon its land, had not only its clubhouse, but various members of the club had cottages there. The club sold telegraph poles, railroad ties and other wood from its woodlands, the purchasers usually doing their own logging. It also sells trees to its members for firewood, in cutting this wood the club's employees are used. At the time of his death Uhl

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was cutting timber to be used as such firewood. The only questions for decision are, first, as to whether the employment was under the act, and, second, was the work carried on for pecuniary gain.

Compensation is asked for the death on January 22, 1916, of Henry Uhl. Mr. Uhl was employed as general utility man and helper by the Hartwood Club, an unincorporated association owning about six thousand acres of land, mostly woodland. In addition to a club house, on the property, various members have cottages there. The club has sold from time to time, from its land telegraph poles, railroad ties, etc., the purchasers usually doing their own logging. In addition to this the club sells trees to its members to be used for firewood in their cottages. In cutting this wood the club's employees are used and sufficient is charged for the wood to cover the employees' wages and leave a profit of about ten per cent. This has been the course for years. Uhl was engaged in cutting timber to be used as above set forth, when he was killed by the fall of a tree. The questions to be decided are:

*First.* Was the employment under this act.

*Second.* Was the work carried on for pecuniary gain?

Robert W. Bonyng, Chief Counsel to State Industrial Commission.

Mr. Jones for insurance carrier.

G. H. Morris, attorney for employer.

LYON, Commissioner.—I think the employment is covered by group 14 of section 2 of this act. Mr. Uhl was certainly performing the same work and subject to the same hazard as men usually are while "lumbering" or "logging." The employer's first notice of injury contains the following: "About 9 o'clock Saturday morning January 22, 1916, Henry Uhl, Frank Quackenbush and Oscar Stanton, all in the employ of the Hartwood Club, were cutting trees on the club property. A tree cut by Oscar Stanton fell and the upper branches of the tree struck Henry Uhl on the head resulting in fracture of the skull and death. So far as is known death was instantaneous." This is one of the very hazards which a lumberman or a logger undergoes, and it was

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a hazard which the evidence shows the employees of the club were frequently subjected to on the club's six thousand acres of woodland, and against which the club carried insurance.

I think also that the work in which Uhl was engaged was being carried on for pecuniary gain. If a man owning a tract of woodland hires a man to cut wood for the employer's own use it might be questioned whether the work was carried on for pecuniary gain within the act. But such is not this case. This club had a large tract of woodland, upon which there was timber which the club could and did sell at a profit. It was convenient for the club members and their guests to buy firewood from the club and this they did paying for the wood, the cutting and a profit besides. The club's articles of association provided for payment of dividends, showing that the possibility of considerable profit was thought of. Under section 21 of the Compensation Law we are compelled to presume that the case is compensatable and this coupled with repeated rulings of the appellate courts, that the act is to receive a liberal construction, leads me, upon all the evidence in the case, to recommend that an award be made.

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In the Matter of the Claim of MORRIS SHAYNE, for Compensation under the Workmen's Compensation Law, against AMERICAN CAP FRONTS MANUFACTURING COMPANY, Employer; STANDARD ACCIDENT INSURANCE COMPANY of Detroit, Mich., Insurance Carrier

Claim No. 30537

(Decided July 18, 1916)

Injuries received by Morris Shayne while employed as a cutter and machine press operator by the American Cap Fronts Manufacturing Company, in the city of New York.

On June 9, 1916, Morris Shayne, while working for his employer, the American Cap Fronts Manufacturing Company, at the latter's plant, was engaged in cutting goods by machine when the little finger of his right hand was caught and crushed in the machine, resulting in the loss of a portion of the finger. His average weekly wage was the sum of seventeen dollars and thirty-one cents. An award was made.

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Robert W. Bonyng, Chief Counsel to State Industrial Commission.

William A. Jones, Jr., attorney for employer and insurance carrier.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award as follows:

On June 9, 1916, the day when Morris Shayne received his injuries, he resided at 1755 Madison avenue, borough of Manhattan, city of New York, and was employed as a cutter and operator of a machine press by American Cap Fronts Manufacturing Company, a corporation engaged in the business of the manufacture of cap visors, with a plant and place of business at 50 West Third street, borough of Manhattan, city of New York.

On said date while Morris Shayne was working for his employer at his employer's plant, and was engaged in cutting some goods on a cutting machine, the little finger of his right hand caught on top of the die and was crushed by the machine and severely lacerated, and the finger nail was thereby lost and a small portion of the bone of the distal phalange was amputated by the surgeon at the hospital, and the soft tissues of the end of the finger received a permanent injury and the first phalange became permanently immobile, resulting in the loss of use of the entire first phalange of the little finger of the right hand.

The average weekly wage of Morris Shayne was the sum of seventeen dollars and thirty-one cents.

Award of compensation is hereby made against American Cap Fronts Manufacturing Company, employer, and Standard Accident Insurance Company of Detroit, Michigan, insurance carrier, to Morris Shayne, injured employee; at the rate of eleven dollars and fifty-four cents weekly for a period of seven and one-half weeks for the equivalent of the loss of one-half the little finger of the right hand.

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In the Matter of the Claim of HELEN CROTTY and Minor Children,  
for Compensation under the Workmen's Compensation Law, for  
the Death of PATRICK CROTTY, JR., against PENNSYLVANIA  
RAILROAD COMPANY, Employer and Self-Insurer

Claim No. 11983

(Decided July 19, 1916)

**Injuries received by Patrick Crotty, Jr., resulting in his death, while employed as a brakeman by the Pennsylvania Railroad Company.**

On June 21, 1915, Patrick Crotty, Jr., was employed as a brakeman by the Pennsylvania Railroad Company and was engaged in picking up empty coal hopper cars at Blasdell, N. Y., when he was thrown off the back of the train by a sudden stoppage caused by a quick operation of the brakes by the engineer. As a result his left femur was broken and his left eye cut. Crotty was taken to a hospital and while recovering made use of a crutch and on one occasion the crutch slipped throwing him to the floor and resulting in his sustaining a severe fracture. He was confined to his bed, pleurisy and pneumonia developed and he died on October 11, 1915. An award was made

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

Thomas C. Burke, attorney for claimant.

Judson Rumsey, attorney for employer.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award as follows:

On June 21, 1915, the day when Patrick Crotty, Jr., received the injuries which resulted in his death, he resided at 18 Mulford street, Buffalo, N. Y., and was employed as a brakeman by Pennsylvania Railroad Company, a Pennsylvania corporation engaged in the operation of a railroad as a common carrier between points within the State of New York, and also between points within the State of New York and points in other States.

On said date while Patrick Crotty, Jr., was working for his

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employer and was engaged in picking up empty coal hopper cars near Bladell, N. Y., he was thrown off the back of the train by the sudden stoppage of the train caused by a quick operation of the brakes by the engineer, and fell to tracks, thereby receiving an oblique fracture of the upper and middle thirds of the left femur and a cut over the left eye. The train on which he was working was drawn by engine No. 6022 and was picking up the hopper cars to carry them to Bladell, N. Y., where they were later the same day to be picked up by another engine and transferred to Oil City, Penn., for reloading. At the time of the said accident both the employer and employee were engaged in interstate commerce but the injuries to Patrick Crotty, Jr., were not occasioned by any negligence attributable to his employer. After the injury Crotty was transferred to a hospital for treatment. Later on in the hospital he came to a settlement with the railroad company for his injuries for \$510 and gave the railroad company a general release. He wrote a letter to the State Industrial Commission on August 30, 1915, asking the Commission to cancel his claim which he had filed with the Commission on July 22, 1915. While the Commission was proceeding to investigate the conditions under which such request was made, Patrick Crotty, Jr., died at the hospital, and the widow of Patrick Crotty, Jr., thereupon, and upon November 3, 1915, filed with this Commission a claim for compensation on behalf of herself, as widow, and of six minor children. A few weeks before his said death at the hospital Patrick Crotty, Jr., had so far recovered from his fractured femur that he was able to go about the ward of the hospital on crutches, and it was expected by the physician in charge that within a few days he would discharge Crotty from the hospital. This expectation was not realized owing to the fact that one day while walking around the floor of the ward on his crutches, Crotty stopped at the bed of a fellow patient and proceeded to poke one of the crutches at the patient who was lying in bed. While he was doing so, the other crutch slipped on the floor and Crotty was thereby prostrated to the floor. This fall occasioned what is known as a green stick fracture of the left femur which required the authorities to immediately place Crotty in bed again and attend to the fracture so



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occasioned. About a week or ten days after being placed in bed Crotty developed a cough which developed into pleurisy and pneumonia, causing his death on October 11, 1915. By reason of the weakened condition in which the original fracture left Crotty, he thereby became more susceptible to cold and pleurisy than he would have been in his normal condition. There was a considerable draft in the hospital and the development of his said pleurisy and pneumonia was a natural consequence of his original injury having reduced his power of resistance so far as not to be able to overcome the effects of the second fall and the drafts in the hospital. The average weekly wage of Patrick Crotty, Jr., was the sum of twenty dollars and nineteen cents.

Patrick Crotty, Jr., left him surviving his widow, Helen Crotty, aged thirty-seven years; his son, Joseph, aged twelve years; his son, Patrick, aged ten years; his daughter, Mary, aged eight years; his son, William, aged seven years; his son, John, aged five years; and his son, James, aged three years, the claimants herein, and no other child or children under the age of eighteen years.

Due notice of injury was given to the employer by Patrick Crotty, Jr., during his lifetime and due notice of death was given to the employer by the claimants herein.

The general release which was executed by Patrick Crotty, Jr., in favor of Pennsylvania Railroad Company in respect of the above accident is null and void.

Award of compensation is hereby made against Pennsylvania Railroad Company, employer, to the widow and minor children of Patrick Crotty, Jr., deceased employee, as follows: to Helen Crotty, widow, aged thirty-seven years, at the rate of six dollars, five and seven-tenths cents weekly during widowhood, with two years compensation in one sum upon remarriage; and to Joseph, son, aged twelve years; and to Patrick, son, aged ten years; and to Mary, daughter, aged eight years; and to William, son, aged seven years; and to John, son, aged five years; and to James, son, aged three years; at the rate of one dollar, twenty-three and three-tenths cents weekly, each, until they shall respectively arrive at the age of eighteen years; and if the payments to any one of the said children shall cease by operation of law or otherwise, then the

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payments to the remaining children shall be proportionately increased until each of said children shall be receiving weekly 10 per cent of the average weekly wage above mentioned, but in no event shall the total payments to all the said children be greater than 36 $\frac{2}{3}$  per cent of the said average weekly wage; and to William S. Driscoll, undertaker, in the sum of one hundred dollars, on account of the expenses of the funeral and burial of Patrick Crotty, Jr., deceased.

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In the Matter of the Claim of HENRY P. OWENS and MARY I. OWENS, Dependent Father and Mother, for Compensation under the Workmen's Compensation Law, for the Death of MARTHA OWENS, against NEW YORK MILLS CORPORATION, Employer; AMERICAN MUTUAL COMPENSATION INSURANCE COMPANY, Insurance Carrier

Claim No. 15547

(Decided July 19, 1916)

Injuries received by Martha Owens, resulting in her death, while working for the New York Mills Corporation at New York Mills, Oneida county.

On June 9, 1915, while Martha Owens was employed by the New York Mills Corporation, which was engaged in manufacturing cotton cloth and dyeing goods at New York Mills, Oneida county, N. Y., she was ordered to lift a heavy beam of yarn, and while so doing suffered an abdominal strain, which produced an inflammation requiring an operation which resulted in acute gastritis, and caused her death on July 11, 1915. Her average weekly wage was the sum of nine dollars. An award was made.

Robert W. Bonyne, Chief Counsel to State Industrial Commission.

Jeremiah F. Connor, for employer and insurance carrier.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, award and decision as follows:

On June 9, 1915, the day when Martha Owens received her injuries, she resided at New York Mills, Oneida county, N. Y., and was employed as a spool tender by New York Mills Corpora-

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tion, a corporation engaged in the business of manufacturing cotton goods and of dyers, with a plant and place of business on Main street at New York Mills, Oneida county, N. Y.

On said date while Martha Owens was working for her employer at her employer's plant, she was called upon by one of the men to help lift a heavy beam of yarn weighing 260 pounds, which beam was being lifted from a warper to a cart, and while engaged in so lifting the beam, she suffered a severe abdominal strain. Previous to the accident Martha Owens had a diseased adneva which became acutely inflamed by reason of the abdominal strain occasioned by said heavy lifting, causing her great suffering and pain and distress and a swelling in the pelvis, requiring operative interference on July 9, 1915, and she developed by reason of the operation post operative acute gastric dilatation and nephritis thereby causing her death on July 11, 1915.

The average weekly wage of Martha Owens was the sum of nine dollars.

Martha Owens left her surviving and partially dependent upon her for support at the time of the said accident her father, Henry P. Owens, aged fifty-six years, and her mother, Mary I. Owens, aged fifty-six years, the claimants herein.

Due notice of injury was given by Martha Owens to her employer. The above-mentioned dependents failed to give notice of death to the employer, but the failure so to do has not prejudiced the employer.

Award of compensation is hereby made against New York Mills Corporation, employer, and American Mutual Compensation Insurance Company, insurance carrier, to the dependent mother and father of Martha Owens, deceased employee, as follows: to Henry P. Owens, father, aged fifty-six years, at the rate of one dollar and thirty-five cents weekly during dependency; and to Mary I. Owens, mother, aged fifty-six years, at the date of one dollar and thirty-five cents weekly during dependency; and to Bernard L. Wrench in the sum of one hundred dollars on account of the funeral expenses of Martha Owens, deceased.

The failure of the dependents to give notice of death to the employer has not prejudiced the employer, and is therefore excused.

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In the Matter of the Claim of OSCAR CUMMINGS, for Compensation under the Workmen's Compensation Law, against JOHN JOHNSON CONSTRUCTION COMPANY, Employer; HARTFORD ACCIDENT AND INDEMNITY COMPANY, Insurance Carrier

Claim No. 15931

(Decided July 19, 1916)

**Injuries received by Oscar Cummings while employed as a steam-shovel engineer by John Johnson Construction Company.**

On September 7, 1915, while Oscar Cummings was employed as a steam-shovel engineer by the John Johnson Construction Company, a corporation engaged in carrying on the business of general contracting at Buffalo, N. Y., he was working for his employer at East Bethany, N. Y., on a State road job. He started for Buffalo on his motorcycle in order to reach there on time to unload the steam shovel early the next morning. On his trip he struck a tree, sustaining injuries which disabled him from working for thirty-two weeks. His average weekly wage was the sum of twenty-three dollars and eight cents. An award was made.

Robert W. Bonyng, Chief Counsel to State Industrial Commission.

Dayton & Bailey, attorneys for employer and insurance carrier.

Ralph N. Kent, attorney for claimant.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award as follows:

On September 7, 1915, the day when Oscar Cummings received his injuries, he resided at 501 Northampton street, Buffalo, N. Y., and on that date and for three years prior thereto was employed as a steam-shovel engineer by John Johnson Construction Company a corporation engaged in the business of general contractors,

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with an office at 705 Abbott road, Buffalo, N. Y. On Saturday, September 4, 1915, Cummings was working for his employer on a State road job at East Bethany, N. Y., and was ordered by his employer to work on the following Sunday and the following Monday (Labor Day) in order that the State road job could be completed so far as the steam-shovel went and so that the steam-shovel could be loaded on to a train to be carried to Buffalo in order to be started at work at Buffalo on Wednesday morning. Cummings had charge of the moving of the steam-shovel. On Tuesday, September seventh, the steam-shovel was loaded on to the train by 6 o'clock P. M., and at about 7.30 P. M. the claimant saw the shovel shipped out of East Bethany.

Just after the shipping of the shovel Cummings mounted his motorcycle and started for Buffalo in order to arrive there in time to unload the steam-shovel the next morning. Before he had gone a mile he struck a rut in the road which caused his wheel to swerve and strike a tree alongside the road, thereby throwing Cummings to the ground. He sustained a fracture of the left tibia and fibula, by reason of which injuries he was disabled from working from the date of the accident to May 2, 1916, a period of thirty-two weeks. The motorcycle belonged to Cummings. His employer knew that he rode a motorcycle and that he used it frequently in the employer's service by riding to Batavia to procure machinery parts, and the employer permitted him to take gasoline from the employer's stock whenever convenient. The employer paid the men for the time it takes to go from job to job. The other men on the job went on the train which carried the shovel. Cummings was paid at the overtime rate while actually enroute between East Bethany and Buffalo, N. Y. Cummings was expected by his employer to be in Buffalo early the next morning to help unload the shovel from the train, which train was expected to arrive in Buffalo early in the morning.

The average weekly wage of Oscar Cummings for the purpose of compensation is the sum of twenty-three dollars and eight cents.

Award of compensation is hereby made against John Johnson Construction Company, employer, and Hartford Accident and

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Indemnity Company, insurance carrier, to Oscar Cummings, injured employee, at the rate of fifteen dollars weekly for a period of thirty-two weeks from September 21, 1915, to May 2, 1916.

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In the Matter of the Claim of THOMAS SALEMI, for Compensation under the Workmen's Compensation Law, against MAX MAYER, INC., Employer; ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY, Insurance Carrier

Claim No. 30152

(Decided July 20, 1916)

Injuries received by Thomas Salemi while employed as an operator on hats by Max Mayer, Inc.

On May 9, 1916, while Thomas Salemi was at work as an operator on hats for his employer, Max Mayer, Inc., in the city of New York, he was engaged in putting a strap on the wheel of a machine, when one of his fingers was caught in the machine, resulting in an injury which disabled him from working until June 1, 1916. His average weekly wage was the sum of twenty dollars and nineteen cents. An award was made.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

Alfred W. Andrews, attorney for employer and insurance carrier.

By THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award as follows:

On May 9, 1916, the day when Thomas Salemi received his injury, he resided at 215 East Ninety-seventh street, borough of Manhattan, city of New York, and was employed as an operator on hats by Max Mayer, Inc., a corporation engaged in the business of manufacturing baby caps and misses' hats, with a plant and

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place of business at 352 Fourth avenue, borough of Manhattan, city of New York.

On said date while Thomas Salemi was working for his employer at his employer's plant, and was engaged in putting a strap on the wheel of a machine, the second finger of his left hand was caught in the machine and he thereby received a cut about one-half inch long, by reason of which injury Thomas Salemi was disabled from the date of the accident to June 1, 1916, a period of three weeks and two days.

The average weekly wage of Thomas Salemi was the sum of twenty dollars and nineteen cents.

Award of compensation is hereby made against Max Mayer, Inc., employer, and Zurich General Accident and Liability Insurance Company, insurance carrier, to Thomas Salemi, injured employee, at the rate of thirteen dollars and forty-six cents weekly for a period of one and one-third weeks from May 23 to June 1, 1916.

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In the Matter of the Claim of ROSANNA WOOD and Minor Children, for Compensation under the Workmen's Compensation Law, for the Death of ANTOINE WOOD, against TUPPER LAKE CHEMICAL COMPANY, Employer; THE TRAVELERS' INSURANCE COMPANY, Insurance Carrier

Claim No. 16941

(Decided July 20, 1916)

Injuries received by Antoine Wood, resulting in his death, while employed as an expert machinist by the Tupper Lake Chemical Company.

On March 4, 1916, Antoine Wood sustained the injuries which resulted in his death. On January 12, 1915, he formed a partnership with his father and two brothers for the purpose of carrying on a garage business. On the said 4th day of March, 1916, Wood worked for a corporation known as the Tupper Lake Chemical Company; while so employed, he was preparing to begin the repairs of retort No. 2, when retort No. 3 exploded and blew off the top of his head, killing him instantly. His average weekly wage was the sum of twenty-three dollars and six cents. An award was made.

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Robert W. Bonyng, Chief Counsel to State Industrial Commission.

Rosendale, Hessberg, Dugan & Haines, attorneys for employer and insurance carrier.

Francis H. Slater, attorney for claimants.

BY THE COMMISSION.—On March 13, 1916, the employer and Rosanna Wood on her own behalf and on behalf of her children, came to an agreement for the payment of compensation, which agreement was not filed with the Commission by the employer until after claim was made, it being the contention of the insurance carrier that it did not discover the facts of the relation of Antoine Wood to Wood's Garage until after the said agreement had been signed by its agent on behalf of it (the insurance carrier) and the employer.

All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award as follows:

On March 4, 1916, the day when Antoine Wood received the injuries which resulted in his death, he resided at Tupper Lake, N. Y. Antoine Wood was an expert machinist, and on January 12, 1915, he formed a partnership with his father and two brothers for the purpose of carrying on a garage business, including the repair of automobiles and the sale of automobile supplies, gasoline and oil, and all business usually done or carried on in a garage. By the terms of the partnership the arrangement was to exist for one year and the partnership was to do business under the name of Wood's Garage. They also advertised on their bill-heads to do the work of "Autogenius welding and cutting." Most of the work of the partnership was done by the four partners themselves although they took on assistants whenever the case required. The partners were assigned to different portions of the work, and Antoine Wood has assigned to him the work of welding and cutting, he being particularly expert in that work. The partners drew weekly sums each, and any balance remaining in the treasury



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after such sums and regular expenses of the business were paid, was divided equally among the partners. The partnership terminated at midnight of January 11, 1916, by its terms but there was no formal dissolution at that time or at any other time prior to the death of Antoine Wood, nor was there any renewal of the partnership by formal act. They continued to conduct the business as it had been previously conducted, awaiting only an opportunity to sell out the business, in the meantime attempting only to make a living out of what work they could obtain. The arrangement as to withdrawals was continued and all funds received were deposited as usual in the bank to the credit of Wood's Garage.

Between Tupper Lake and Tupper Lake Junction in Franklin county, N. Y., there was the plant of the Tupper Lake Chemical Company, a corporation engaged in the business of manufacturing wood alcohol, acetate of lime and charcoal. For the purpose of its business the corporation operated steel retorts for their manufacturing processes and these retorts would occasionally get into a leaky condition, requiring prompt repair. The corporation had in its employ men who could do the work of repair, but owing to the fact that these men were needed in other operations, it was customary for the corporation to secure the services of Antoine Wood for the purpose of repairing the retorts. He would cut out a portion of the retort at the place where the leak occurred and insert a new piece and weld the same firmly in place. He was paid at the rate of sixty cents an hour and worked on an average of ten hours a day. There were certain chemicals such as oxygen and gas which were used in the process of welding. As the corporation did not have these chemicals at the plant as a regular thing, Wood brought them with him and charged the corporation for the amount of oxygen and gas used. He also charged the corporation at the rate of fifty cents a day for the use of his welding apparatus which he also brought with him. He was hired by the superintendent of the corporation as the occasion might require and the superintendent had authority to discharge him. The superintendent assigned regular employees of the corporation to assist Wood whenever necessary. Owing to the fact that Wood

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was a very expert mechanic and welder it was not necessary for the superintendent to exercise minute control over what he did further than to direct him as to the ovens on which he was to operate. Bills were rendered to the corporation from time to time on the bill-head of Wood's Garage, which bills included charges for the oxygen and gas used, and for the use of the welder at fifty cents per day, and for the services of Antoine Wood at the rate of sixty cents an hour. These bills were customarily paid by the check of the company drawn to the order of Wood's Garage and were deposited in the account of Wood's Garage at its bank. Between February 15, 1916, and March 4, 1916, Antoine Wood worked on such work for the corporation six days. The services of Antoine Wood had been required by the corporation on several occasions before February 15, 1916, and originally he was placed upon the payrolls of the corporation when he was so employed, but owing to the fact that Wood secured his oxygen and gas and leased his welder to the corporation, it made a complication in the payroll and the corporation refrained from the practice of putting him on the payroll and paid him separately for all items by check as above set forth. Antoine Wood was an employee of the Tupper Lake Chemical Company at the time of the accident which resulted in his death.

On March 4, 1916, at about 8:45 A. M. while Antoine Wood was working for his employer at his employer's plant and was preparing to go to work on the repairs of retort No. 2 and while he was passing retort No. 3, retort No. 3 exploded and blew off the top of his head instantly killing him.

The average weekly wage of Antoine Wood was the sum of twenty-three dollars and six cents.

Due notice of death was given to the employer.

Antoine Wood left him surviving his widow, Rosanna Wood, aged twenty-seven years; his son, Eric, aged eight years; his daughter, Alice, aged six years; his daughter, Cecile, aged four years; his son, Arthur, aged three years; and his daughter, Olive, aged two years, the claimants herein, and no other child or children under the age of eighteen years.

Award of compensation is hereby made against Tupper Lake

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State Industrial Commission

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Chemical Company, employer, and the Travelers' Insurance Company, insurance carrier, to the widow and minor children of Antoine Wood, deceased employee, as follows: to Rosanna Wood, widow, aged twenty-seven years, at the rate of six dollars and ninety-two cents weekly during widowhood, with two years' compensation in one sum upon remarriage; and to Eric, son, aged eight years, and to Alice, daughter, aged six years; and to Cecile, daughter, aged four years; and to Arthur, son aged three years; and to Olive, daughter, aged two years, at the rate of one dollar and six hundred and ninety-two one-hundredths cents weekly, each, until they shall respectively arrive at the age of eighteen years; and if the payment to any one or more of the said children shall cease to be due by operation of law or otherwise, then the payment to the remaining children shall be increased proportionately until they shall respectively receive a weekly payment equal to 10 per cent of the average weekly wage above mentioned, but in no case shall the total payments to the children be greater than  $56\frac{2}{3}$  per cent of the above mentioned average weekly wage; and to E. S. Drew & Son, undertaker, in the sum of one hundred dollars on account of the funeral expenses of Antoine Wood, deceased.

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In the Matter of the Claim of ANNA E. SMITH, for Compensation under the Workmen's Compensation Law, against LOUIS GOLD, Employer; ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier

Claim No. 15419

(Decided July 20, 1916)

Injuries received by Anna E. Smith while employed as a alteration hand by Louis Gold.

On October 9, 1915, Anna E. Smith, while employed as an alteration hand by Louis Gold, who was engaged in the business of retailing ladies' specialties at Utica, N. Y., was going up the rear stairs to her work place, when she slipped and broke her left leg below the knee, disabling her from work for a period of thirteen weeks. Her average weekly wage was the sum of seven dollars and sixty-nine cents. An award was made.

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State Industrial Commission

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This claim came on for hearing before the State Industrial Commission at its office at Albany, N. Y., on March 8, and April 5, 1916. On March 8, 1916, an award of compensation was made for ten weeks. On April 5, 1916, an award was made for four additional weeks. It was subsequently learned that a mistake was made on this last award, and on July 20, 1916, another hearing was had and the award of April 5, 1916, was rescinded and a new award was made for compensation for one week from January 1, to January 8, 1916.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

William M. Foster, attorney for employer and insurance carrier.

Rudd & Judson, attorneys for claimant.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award as follows:

On October 9, 1915, the day when Anna E. Smith received her injuries, she resided at 57 Grant street, Utica, N. Y., and was employed as an alteration hand by Louis Gold who was engaged in the business of retailing ladies' specialties, with a place of business at 151 Genesee street, Utica, N. Y.

The duties of Anna E. Smith were to alter ladies' clothing in cases where it was necessary to make an alteration in order that the garments might fit.

On said date at about 2 p. m. Anna E. Smith was returning from lunch and was going up the rear stairs in the building of her employer in order to go to her place of work and she slipped on the stairs and thereby broke both bones of her left leg below the knee, by reason of which injury she was disabled from working from the date of the accident to the 8th day of January, 1916, a period of thirteen weeks.

The average weekly wage of Anna E. Smith was the sum of seven dollars and sixty-nine cents.

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State Industrial Commission

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Award of compensation is hereby made against Louis Gold, employer, and Aetna Life Insurance Company, insurance carrier, to Anna E. Smith, injured employee, at the rate of five dollars and thirteen cents weekly for a period of eleven weeks from October 23, 1915, to January 8, 1916.

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In the Matter of the Claim of PHILIP PAVIA, for Compensation under the Workmen's Compensation Law, against THE PETROLEUM IRON WORKS COMPANY OF PENNSYLVANIA, Employer and Self-Insurer

Claim No. 34501

(Decided July 27, 1916)

Application to withdraw claim for compensation so as to sue employer at common law.

On the original hearing of this matter before the Commission an award of \$105.71 was made, but subsequently the claimant refused to accept this sum from the employer, and on April 31, 1916, filed with the Commission a statement that he withdrew his claim for compensation, as he intended to sue his employer at common law, as the latter did not have insurance as required by the Compensation Law at the time of the accident. The Commission heard the matter of the proposed withdrawing and denied application.

This claim came on for hearing before the State Industrial Commission at its office, No. 230 Fifth avenue, borough of Manhattan, city of New York, on April 17, 1916, at which time an award of eleven weeks' compensation at the rate of nine dollars and sixty-one cents weekly, making a total of \$105.71, was made to the claimant. Thereafter and within ten days the employer tendered to said claimant the sum of \$105.71 which was refused by the claimant. On April 21st, the claimant filed with the Commission a statement that he withdrew his claim for compensation, stating that it was his intention to sue his employer at common law on the ground that his employer did not have insurance as required by the Compensation Law at the time of the accident.

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On July 27, 1916, the claimant appeared before the Commission and made application for leave to withdraw his claim for compensation and for the rescision of the award theretofore made. The Commission heard all the evidence in the case and examined the claimant, and denied the application to rescind the previous award and denied the application for leave to withdraw the claim and made an award of compensation for the period between the previous award and the date of the hearing.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

Cornelius J. Earley, attorney for claimant.

T. F. Silkman & A. A. Houeck, attorneys for employer.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, award and decision as follows:

On December 9, 1915, the day when Philip Pavia received his injuries, he resided at 794 Vernon avenue, Long Island City, and was employed as a boilermaker's helper by The Petroleum Iron Works Company of Pennsylvania, a Pennsylvania corporation engaged in the business of constructing tanks, with business headquarters in New York city. On the date of the accident the said corporation was constructing a tank for the Texas Oil Company on Borden avenue, Long Island City, and Philip Pavia was working on that job.

On said date while Philip Pavia was working for his employer on the said construction work and while he was fitting up a center pole of a tank, he was accidentally struck on the head by a plank four inches square which produced in him a traumatic hysteria causing paralysis of the right arm, right leg, with neuralgic pains in the head and loss of sensation in the flesh on the right side of the body whereby Philip Pavia was disabled from working from the date of the accident until July 27, 1916, and on that date was still disabled.

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The average weekly wage of Philip Pavia was the sum of fourteen dollars and forty-two cents.

Award of additional compensation is hereby made against The Petroleum Iron Works Company of Pennsylvania, employer, to Philip Pavia, injured employee, at the rate of nine dollars and sixty-one cents weekly, for a period of twenty weeks from March 21, 1916 to July 28, 1916, and this claim is hereby continued for further hearing.

The application of Philip Pavia for a rescission and revocation of the award of this Commission, bearing date April 17, 1916, is hereby denied, and the application of Philip Pavia for leave to withdraw his claim for compensation herein is hereby denied on the ground that the claimant has duly elected to take compensation, and the claim for compensation herein is hereby continued for further hearing.

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In the Matter of the Claim of MOSES JENKINS, for Compensation under the Workmen's Compensation Law, against T. HOGAN & SONS, INC., Employer; ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY, Insurance Carrier

Claim No. 15207

(Decided July 31, 1916)

Injuries received by Moses Jenkins while employed as a longshoreman by T. Hogan & Sons, Inc.

On May 15, 1916, while Moses Jenkins was employed as a longshoreman by T. Hogan & Sons, Inc., on pier No. 9, West New York, N. J., in unloading a vessel, he was struck by the slipping of a roller under some steel bars, resulting in his being disabled until July 31, 1916, and on that date was still disabled. His average weekly wage was the sum of twenty-three dollars and eight cents. An award was made.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

Alfred W. Andrews, attorney for employer and insurance carrier.

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State Industrial Commission

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BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award as follows:

On May 15, 1916, the day when Moses Jenkins received his injuries, he resided at 236 West Sixty-second street, borough of Manhattan, city of New York, and was employed as a longshoreman by T. Hogan & Sons, Inc., a corporation engaged in the business of stevedores, with an office in Produce Exchange Building, borough of Manhattan, city of New York. Moses Jenkins kept his home in New Jersey, in which State he voted. He kept a room at the New York address for the purpose of his business and was able to get to his home in New Jersey only once in every week or two. He sent money to his family for their support in Jersey. His employer took contracts to unload ships in New York harbor on both the New York and Jersey sides. On April 25, 1916, the foreman of T. Hogan & Sons, Inc., went to Jenkins' home on West Sixty-second street and engaged him to work at pier No. 9, West New York, N. J., and Jenkins started working the next day at that place.

On said date while working for his employer in unloading a vessel at West New York, N. J., Moses Jenkins was struck on the left ankle by the slipping of a roller under a draft of steel bars, causing Jenkins to be disabled from working from the date of the accident to July 31, 1916, and on that day he was still disabled.

The average weekly wage of Moses Jenkins was the sum of twenty-three dollars and eight cents.

Award of compensation is hereby made against T. Hogan & Sons, Inc., employer, and Zurich General Accident and Liability Insurance Company, insurance carrier, to Moses Jenkins, injured employee, at the rate of fifteen dollars weekly for a period of nine weeks from May 29, 1916, to July 31, 1916, and this claim is hereby continued for further hearing.



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**In the Matter of the Claim of SRA. ROSINA A. ALONGI and Minor Children, for Compensation under the Workmen's Compensation Law, for the Death of STEFANO ALONGI, against M. F. SMITH & SONS Co., Employer; MANUFACTURERS' LIABILITY INSURANCE Co. OF NEW JERSEY, Insurance Carrier**

**Claim No. 160**

(Decided August 5, 1916)

**Injuries received by Stefano Alongi, resulting in his death, while employed as a longshoreman by M. F. Smith & Sons Co.**

On April 3, 1916, while Stefano Alongi was employed as a longshoreman by M. F. Smith & Sons Co., contracting stevedores in the city of New York, he was mounting a step-ladder to the deck of a steamship, when he fell into a coal boat lying alongside, sustaining a fracture of the skull, causing his death four days later. His average weekly wage was the sum of twenty dollars and nineteen cents. An award was made.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

Albert Van Winkle, attorney for employer and insurance carrier.

F. San Dominick, attorney for claimants.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, award and decision as follows:

On April 3, 1916, the day when Stefano Alongi received the injuries which resulted in his death, he resided at 425 North Sixteenth street, borough of Manhattan, city of New York, and was employed as a longshoreman by M. F. Smith & Sons Co., who were in the business of contracting stevedores, with an office at 116 Broad street, borough of Manhattan, city of New York.

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On said date while Stefano Alongi was working for his employer on a stevedoring contract which his employer had in respect of Steamship *Carpathia* at pier 83, N. R., borough of Manhattan, city of New York, and while mounting a step-ladder leading to the deck of the steamship, he accidentally fell from the ladder into a coal boat laying alongside the steamship, and thereby received a fracture of the skull, causing his death on April 7, 1916.

The average weekly wage of Stefano Alongi was the sum of twenty dollars and nineteen cents.

Stefano Alongi left him surviving his widow, Sra. Rosina A. Alongi, aged forty years, his daughter, Rosina Alongi, aged twelve years, and his son, Pietro Alongi, aged ten years, the claimants herein, and no other child or children under the age of eighteen years.

Due notice of death was given to the employer. No notice of injury was served upon the employer within ten days of the accident for the reason that Stefano Alongi was unable to give any notice owing to his physical condition. His employer was not prejudiced by such failure.

Award of compensation is hereby made against M. F. Smith & Sons Company, employer, and Manufacturer's Liability Insurance Company of New Jersey, insurance carrier, to the widow and minor children of Stefano Alongi, deceased employee, as follows: to Sra. Rosina A. Alongi, widow, aged forty years, at the rate of six dollars and five and seven-tenths cents weekly during widowhood, with two years' compensation in one sum upon remarriage; and to Rosina Alongi, daughter, aged twelve years, and to Pietro Alongi, son, aged ten years, at the rate of two dollars and one and nine-tenths cents weekly, each until they shall respectively arrive at the age of eighteen years.

The failure of Stefano Alongi to give written notice of his injury to his employer within ten days of his accident is hereby excused on the ground that he was not able, himself, to give such notice, and that the employer was not prejudiced by such failure.

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In the Matter of the Claim of ELIZABETH KEHOE, for Compensation under the Workmen's Compensation Law, for the Death of JOHN KEHOE, against CONSOLIDATED TELEGRAPH AND ELECTRICAL SUBWAY COMPANY, Employer and Self-Insurer

Claim No. 15170

(Decided August 10, 1916)

Injuries received by John Kehoe, resulting in his death, while employed as a watchman by the Consolidated Telegraph and Electrical Subway Company.

On April 30, 1916, while John Kehoe was employed as a watchman, by the Consolidated Telegraph and Electrical Subway Company, in charge of a store-yard in the city of New York, he was found early in the morning sitting dead in a chair in the store yard shanty. A gas tube had become disconnected and he was killed by gas poisoning. His average weekly wage was the sum of fourteen dollars and thirty-six cents. An award was made.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

Beardsley, Hemmens & Taylor, attorneys for employer.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award as follows:

On April 30, 1916, the day when John Kehoe received the injuries which resulted in his death, he resided at 315 East Fifty-sixth street, borough of Manhattan, city of New York, and was employed as a watchman of a store-yard by Consolidated Telegraph and Electrical Subway Company, a corporation engaged in the business of constructing electrical conduits with a place of business at 54 Lafayette street and a store-yard on Sixtieth street between Eleventh and Twelfth avenues, in the borough of Manhattan, city of New York.

On said date at about 5 A. M., John Kehoe was found sitting

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dead in a chair in the shanty of the store-yard. A rubber tube feeding a gas heater in the shanty was disconnected and the gas was flowing from the tube. The window of the shanty was open at the time. The cause of Kehoe's death was gas poisoning from the gas which escaped into the room from the tube.

The average weekly wage of John Kehoe was the sum of fourteen dollars and thirty-six cents.

John Kehoe worked seven days a week.

John Kehoe left him surviving his widow, Elizabeth Kehoe, aged sixty-three years, the claimant herein, and no child or children under the age of eighteen years.

Award of compensation is hereby made against Consolidated Telegraph and Electrical Subway Company, employer and self-insurer, to the widow of John Kehoe, deceased employee, as follows: to Elizabeth Kehoe, widow, aged sixty-three years, at the rate of four dollars and thirty-one cents weekly during widowhood, with two years' compensation in one sum upon remarriage; and to George P. Krumm, undertaker, in the sum of one hundred dollars on account of the funeral expenses of John Kehoe, deceased.

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In the Matter of the Claim of MARIA CAMPANELLA and Minor Children, for Compensation under the Workmen's Compensation Law, for the Death of CALOGERO CAMPANELLA, against FRANK STOLA CONSTRUCTION AND BUILDING COMPANY, Employer; AETNA LIFE INSURANCE COMPANY, Insurance Carrier

Claim No. 464

(Decided August 15, 1916)

Injuries received by Calogero Campanella, resulting in his death, while employed as a hod carrier by the Frank Stola Construction and Building Company.

On November 17, 1915, Calogero Campanella, while employed as a hod carrier by the Frank Stola Construction and Building Company, was at work on a structure on Washington place, New York city, when he fell from the fifth floor and was instantly killed. An award was made.

Compensation is claimed for the death on November 17, 1915, of Calogero Campanella. Claimants are the widow and children

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of deceased. An award has been made on recommendation of our deputy. The insurance carrier asks to have the award vacated on the ground that the accident did not arise out of and in the course of the employment. Campanella was a hod carrier employed on a building in the course of erection on Washington place, New York city. The morning had been rainy and no work had been done that day. At about 10 A. M. Campanella fell from the fifth floor and was instantly killed. The question to be determined is, did the accident arise out of and in the course of employment.

Mr. Dioguareti, attorney for claimants.

Mr. T. C. Jones, attorney for insurance carrier.

LYON, Commissioner.—No one could be found who knew why the deceased went to the fifth floor or how he came to fall, though one witness said that deceased said, "Come, let us go up and put on our overalls." It had rained hard the previous day and was still raining on the morning in question, but not hard, and the rain had nearly or quite ceased at the time of the accident. It seems that concrete work cannot proceed after a severe rain until the building has dried out, but this is not the case with brick work. A new quantity of brick had been ordered and was expected that morning, but there was on hand sufficient with which to commence work and to last for perhaps half a day.

Stola, who was personally in charge of the work, testified that he told the men in the morning that owing to the rain they would not work until one o'clock, but this may have referred to concrete workers, for several witnesses testified that he also said that if the brick came before 10, they might work at 10 o'clock. The testimony is quite conflicting, but I think on careful consideration of all the testimony in the case and all the circumstances, that deceased remained on the plant upon the statement and with the expectation that work would probably begin about 10 o'clock, that he went to the fifth floor at about that time to make ready for work and fell to his death from some unknown mishap. This is strengthened by the presumption raised by section 21 of the Compensation Law.

I advise that the award previously made be confirmed.

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In the Matter of the Claim of **BENEDETTA FONTANA ANGELUCCI**,  
for Compensation under the Workmen's Compensation Law,  
for the Death of **LUIGI ANGELUCCI** against **H. S. KERBAUGH**,  
Inc., Employer

Claim No. 80865

(Decided August 15, 1916)

**Injuries received by Luigi Angelucci, resulting in his death, while employed by H. S. Kerbaugh, Inc.**

On September 17, 1914, Luigi Angelucci, while employed by H. S. Kerbaugh, Inc., sustained fatal injuries and died as the result on the same day. The claim of Benedetta Fontana Angelucci and the alleged daughters, Francisca and Antonia, as wife and children held not to be established. Award denied.

Luigi Angelucci was injured on September 17, 1914, while in the employ of H. S. Kerbaugh, Inc., and died as the result of such injury, on the same day.

On September 7, 1915, claim for compensation was made by the Italian consul on behalf of Benedetta Fontana Angelucci, wife, Delfina Angelucci, daughter, and Angela Negri, mother of deceased. The claims of the mother and daughter, Belfina, were allowed, and have been paid in full. That of the wife (claimed to be a common-law wife) was not passed upon, owing, apparently, to lack of proof.

On April 1, 1916, claim for compensation was made by the Italian consul, on behalf not only of the said wife, but on behalf of two daughters, Francisca and Antonia. These claims are resisted by the employer, that of the wife on the ground of insufficient proof of marriage, and the other two for failure of proof of paternity.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

Mr. Sandominick, attorney for claimants.

John J. Cushing, attorney for employer.

LYON, Commissioner.— The claims of the two alleged daughters must be disallowed. Not only are the proofs of paternity insuff-

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ficient (in the case of Francisca the record being that the father is unknown, and in the case of Antonia, that both parents are unknown) but the claims for compensation were not made for more than eighteen months after the death of the employee and are therefore barred by the statute. The claim of the widow, however, was made within the year and must be considered upon the merits.

The parish priest of Perugia certifies under date of January 29, 1916, "that Mr. Angelucci Luigi, son of the deceased Antonio, contracted matrimony in conformity to the Law of the Holy Church of Rome in the year 1907 with Madame Fontana Benedetta." This does not purport to be a copy of the church record, the date is not fixed, and the priest does not state who officiated or how he knows of such a ceremony. It seems to be admitted that there was no civil marriage which is necessary to a complete ceremonial marriage in Italy, for the notice of claim states that "Benedetta Fontana Sinceri was the common-law wife of the deceased." The marriage status must be judged by the law of the place where the marriage is alleged to have taken place. We cannot presume that a common-law marriage is valid in Italy else a civil marriage would not in every case be required. In fact Italy has no common law in our sense of that term.

I do not think that Benedetta Fontana has shown that she was ever the legal wife of the deceased and advise that an award be denied.

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In the Matter of the Claim of S. W. BOWNE, for Compensation under the Workmen's Compensation Law, against S. W. BOWNE COMPANY, Employer; GLOBE INDEMNITY COMPANY, Insurance Carrier

Claim No. 40461

(Decided August 15, 1916)

Injuries received by S. W. Bowne while president of the S. W. Bowne Company.

On March 6, 1916, S. W. Bowne, while working for his employer in the city of Brooklyn, in assisting in taking boards through a window

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caught his left foot in a screw conveyor, resulting in crushing his leg and requiring an amputation above the knee. His average weekly wage was the sum of \$67.27. In the year previous to the accident he had a dividend of \$30,000 from the said company. An award was made.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

J. F. Connor, attorney for employer and insurance carrier.

H. B. Gayley, attorney for claimant.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award as follows:

On March 6, 1916, the day when S. W. Bowne received his injuries, he resided at Water Witch, Monmouth county, N. J., and was employed as the president of S. W. Bowne Company, a corporation engaged in the business of jobbers of hay, straw, grain and feed and in the business of manufacturing corn and oat products into foods.

On said date while S. W. Bowne was working for his employer at his employer's plant at 595-611 Smith street, borough of Brooklyn, city of New York, and while he was engaged in assisting some of the other employees in taking boards through a window, his left foot was caught in a screw conveyor by reason of slipping through a loose board in the floor. The conveyor ran under the floor. The leg was badly crushed and was later amputated above the knee. A new machine for mixing poultry grain had been installed in the plant and some lumber was being delivered to be used in making spouts, and it was while assisting to unload this lumber that the above mentioned accident happened.

S. W. Bowne Company was a domestic corporation with 800 shares of stock of the par value of \$100 each. Of these shares Bowne owned 560 shares, Warlow, the secretary of the company, owned 239 shares, and one H. B. Smith owned 1 share. Bowne was the principal executive officer and was employed by the



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directors at a salary of \$70 per week. In the year previous to the accident the stock owned by Bowne in the company yielded him a dividend of \$30,000.

The average weekly wage of S. W. Bowne was the sum of sixty-seven dollars and twenty-seven cents.

Award of compensation is hereby made against S. W. Bowne Company, employer, and Globe Indemnity Company, insurance carrier, to S. W. Bowne, injured employee, at the rate of twenty dollars weekly for a period of 266 weeks beginning March 6, 1916, for the loss of the left leg.

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**In the Matter of the Claim of THOMAS MARCONTONIO, for Compensation under the Workmen's Compensation Law, against The CHARLES FRANCIS PRESS, Employer; NEW YORK PRINTERS AND BOOK BINDERS MUTUAL INSURANCE COMPANY, Insurance Carrier**

**Claim No. 33165**

**(Decided August 15, 1916)**

**Injuries received by Thomas Marcontonio while employed by the Charles Francis Press.**

On November 30, 1915, Thomas Marcontonio, while employed by the Charles Francis Press, injured his leg while at work for his employer and on January 5, 1916, was found to have cancer of the bone and his leg was amputated. *Held*, that it has not been shown that the cancer was caused by the injury and that there was failure to give proper notice to his employer. Award denied.

The employee claims to have slipped in going up a stairway on the 30th of November, 1915, injuring his leg. He continued working for about two weeks, went to the hospital on the following January fifth, when his trouble was diagnosed as osteosarcoma, or cancer of the bone, and his leg was amputated. He left the hospital the latter part of January and filed his claim for compensation on the sixteenth of February. The insurance carrier claims that no notice of the accident was given until the claim for compensation was filed, although the claimant says that he told his foreman that he had fallen and hurt himself. He

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consulted a physician the day following his injury. This physician says that he found no bruise upon the claimant but that he suspected osteosarcoma and found an undurated substance attached to the bone and the size of half a dollar. The insurance carrier claims that if an injury occurred, as stated by the claimant, it was not the cause of the osteosarcoma. It questions very seriously the truthfulness of the claimant in his statement of the injury and raises the point that it has been prejudiced by the failure to give notice within the time fixed by the statute, and that, therefore, the failure to give notice ought not to be excused by the Commission.

Robert W. Bonyng, Chief Counsel to State Industrial Commission.

B. J. Caruso, for the claimant.

Alfred E. Ommen, for the insurance carrier.

LYON, Commissioner.—It is within the bounds of possibility that the accident happened as claimed by the injured man, and that the osteosarcoma was the result of the accident; but it does not seem to me that the proofs are sufficient for us to find that this possibility was the real fact. Some of the medical profession are of the opinion, it is true, that osteosarcoma may be caused by an injury, but I think all agree that many cases cannot be traced to trauma at all. I am not able to see how the mere slipping upon the stairway, causing an injury so slight that it produced no bruise discernible the following day, could have resulted in the production of an osteosarcoma within twenty-four hours, and yet the physician first called to treat Mr. Marcontonio says, that this was the fact. If the osteosarcoma was caused by an injury, it would seem that it must have been an injury prior to the thirtieth of November. Our medical department is of the opinion that osteosarcoma caused by an injury on November thirtieth, could not have developed sufficiently by January fifth to have caused an enlargement of the bone at that point of the size of a man's fist, which the physician who operated upon the man says he found at that date.

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I, therefore, am of the opinion that it is extremely doubtful whether, if proper investigation had been made at the time, any evidence could have been found which would lead the unprejudiced mind to believe that the injury on November thirtieth, was the cause of this sarcoma. Be that as it may, it seems to me that this is one of the cases where the long delay in giving notice of the injury ought not to be overlooked by the Commission. Had Mr. Marcontonio notified his employer at the time, it would have been quite possible to have made an investigation which would have put the question of the happening of the accident beyond all doubt and have secured medical testimony at the time, which would have thrown light upon the question at least, and probably have definitely solved it.

This case illustrates in a forcible manner the necessity for prompt notice to the employer by injured employees, of any injury however trivial it may appear to the workman to be. The Commission is continually confronted with the most serious complications arising out of accidents which at the time seem to be quite negligible, but when not properly attended to develop, through infection, appalling results. The employer has the right not only under the statute, but under general principles of fairness to know of such injuries, both in order to apply first aid remedies to prevent infection, and to investigate at first hand at the time of the injury, to determine what relation the accident is likely to have upon a future claim for compensation. It is hoped that employers will impress upon their employees the necessity for giving such notice. Of course each case, so far as this feature of it is concerned, must be judged by itself. It is possible that by denying an award in this case, an injustice may be done to this injured workman, but on reading over all the testimony, I do not think that such is the case.

In my opinion the osteosarcoma has not been traced by evidence that is convincing, to the injury which the claimant says he suffered and the failure to give notice of the injury, as provided by law, has been prejudicial to the employer and the insurance carrier and ought not to be excused. I advise that an award be denied.

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In the Matter of the Claim of DELIA B. AMES and Minor Children, for Compensation under the Workmen's Compensation Law, for the Death of WILLIAM AMES, against the NEW YORK CENTRAL RAILROAD COMPANY, Employer and Self-Insurer

Claim No. 67487

(Decided August 15, 1916)

**Injuries received by William Ames, resulting in his death, while employed as a yard engine man by the New York Central Railroad Company.**

On March 8, 1915, while William Ames was employed as a yard engine man by the New York Central Railroad Company at Albany, N. Y., and having completed a trip he left his engine in the freight yard about 100 feet from Spencer street. Instead of leaving the yard by means of this street he walked along the tracks for about 1,000 feet for his own purpose, crossed over another street to the tracks on the other side of that street and was there struck and killed by a passing freight train. His average weekly wage was the sum of twenty-three dollars and sixty-five cents. An award was made.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

O. G. Brown, attorney for employer.

By THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and decision as follows:

On March 8, 1916, the day when William Ames received the injuries which resulted in his death, he resided at 13 Dudley Heights, Albany, N. Y., and was employed as a yard engine man by the New York Central Railroad Company, a corporation engaged in the operation of a railroad as a common carrier between points within the State of New York and also between points within the State of New York and points in other States.

On said date at about 6 o'clock in the morning William Ames

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State Industrial Commission

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had turned in his engine having completed his work and had also turned in his slip showing that his run had been completed. His engine was left by him in the freight yard about 100 feet from the public street, namely Spencer street. There were other streets about the yard, any one of which streets could properly have been used by Ames for the purpose of going home. Instead of leaving the premises by means of one of these streets, Ames walked along the tracks for about 1,000 feet and crossed over another street, and on to the tracks on the other side of the last mentioned street, and was there struck and killed by a passing freight train. The purpose of Ames in going to the place of the accident was supposed to be for the purpose of catching a passing freight train in order to board the same and ride to West Troy, where he could collect his pay. Ames had no authority from his employer to be at the place where the accident occurred and was not at that place on any business in behalf of his employer, but was there for the purpose of his own.

The average weekly wage of William Ames was the sum of twenty three dollars and sixty-five cents.

William Ames left him surviving his widow, Delia B. Ames, aged forty-five years; his daughter, Helen R. Ames, aged fifteen years; his son, William Ames, aged fourteen years; and his daughter, Hazel Ames, aged ten years, the claimants herein, and no other child or children under the age of eighteen years.

The claim against the New York Central Railroad Company, employer, made by the widow and minor children of William Ames, deceased, is hereby denied on the ground that William Ames did not come to his death through an accidental injury arising out of and in the course of his employment with the New York Central Railroad Company.

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State Industrial Commission

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In the Matter of the Claim of SARAH GAFFNEY, for Compensation under the Workmen's Compensation Law, for the Death of PATRICK GAFFNEY, against WYNOTAL REALTY AND HOTEL COMPANY, Employer; ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY, Ltd., Insurance Carrier

Claim No. 10693

(Decided August 15, 1916)

Injuries received by Patrick Gaffney, resulting in his death, while employed by the Wynotal Realty and Hotel Company.

On March 13, 1916, Patrick Gaffney, while employed as a night fireman by the Wynotal Realty and Hotel Company, slipped on a pipe and fractured several ribs, the broken ends of which projected into his chest causing his death from blood poisoning. His average weekly wage was the sum of eleven dollars and fifty-four cents. An award was made.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

Alfred W. Andrews, attorney for employer and insurance carrier.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, award and decision as follows:

On March 13, 1916, the day when Patrick Gaffney, received the injuries which resulted in his death, he resided at 360 West Fifty-third street, borough of Manhattan, city of New York, and was employed as a night fireman by Wynotal Realty and Hotel Company, a corporation engaged in the operation of the Bristol Hotel at Fortieth street and Sixth avenue, borough of Manhattan, city of New York.

On said date while Patrick Gaffney was working for his employer in the basement of the said hotel, he accidentally slipped

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on a pipe and fell across the pipe, thereby fracturing some ribs in his right side, causing the fractured points of the ribs to project into the chest cavity which in turn caused blood, air and pus to accumulate in the thorax and a sepsis to set in causing his death on June 26, 1916.

The average weekly wage of Patrick Gaffney was the sum of eleven dollars and fifty-four cents. The actual wage of Patrick Gaffney was thirty dollars per month in addition to which Gaffney was furnished his board by his employer which was worth the sum of thirty dollars per month.

Patrick Gaffney left him surviving his widow, Sarah Gaffney, aged thirty six years, the claimant herein, and no child or children under the age of eighteen years.

Patrick Gaffney served upon his employer a written notice of injury on April 19, 1916. His failure to serve such notice of injury within ten days of the accident has not prejudiced the employer. Sarah Gaffney did not serve upon the employer a written notice of death, but her failure to do so has not prejudiced the employer.

Award of compensation is hereby made against Wynotal Realty and Hotel Company, employer, and Zurich General Accident and Liability Insurance Company, Ltd., insurance carrier, to Sarah Gaffney, widow of Patrick Gaffney, deceased employee, at the rate of three dollars and forty-six cents weekly during widowhood, with two years' compensation in one sum upon remarriage; said payments to run from June 26, 1916, the date of the death of Patrick Gaffney; and to William A. Curran, undertaker in the sum of \$100, on account of the funeral expenses of Patrick Gaffney, deceased.

The failure of Patrick Gaffney during his lifetime to serve upon his employer a notice of injury within ten days of the accident, and the failure of Sarah Gaffney, the widow, to serve upon the employer within thirty days of the death of Patrick Gaffney a notice of death are hereby excused on the ground that such failures have not prejudiced the employer.

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State Industrial Commission

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In the Matter of the Claim of CATHERINE CHLUDZINSKI, Mother, and BERTHA CHLUDZINSKI, and CAROLINE CHLUDZINSKI, Sisters, and STEPHEN CHLUDZINSKI, Brother, for Compensation under the Workmen's Compensation Law, for the Death of ANTHONY CHLUDZINSKI, against STANDARD OIL COMPANY, Employer; STATE FUND, Insurance Company

Claim No. 628

(Decided August 15, 1916)

Injuries received by Anthony Chludzinski, resulting in his death, while employed as a press repairer by the Standard Oil Company.

On March 3, 1916, Anthony Chludzinski, was employed in dumping filters and repairing press plated by the Standard Oil Company of New York, at Buffalo. Chludzinski went into a locker room alone and five minutes later rushed out of the room with his clothes ablaze, sustaining burns which resulted in his death on that same day. An award was made.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

Robert E. Elenar, attorney for insurance carrier.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and decision as follows:

On March 3, 1916, the day when Anthony Chludzinski received the injuries which resulted in his death, he resided at 1077 Elk street, Buffalo, N. Y., and was employed by Standard Oil Company of New York, a corporation engaged in the business of refiners of petroleum, with a plant at 1103 Elk street, Buffalo, N. Y. The duties of Anthony Chludzinski were the dumping of the filtering presses and repairing filter press plates and blankets.



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Next to the general repair shop was a room which was used as a locker room. This room had formerly been used as a test room but all the testing apparatus had been removed and there was left only a Bunsen burner. Over this burner there was a galvanized iron hood with a six-inch ventilator pipe through the roof. This burner was formerly used for flashing oils and had been left in the room and was, at the time of the accident, used occasionally for heating samples of oil in the wash tanks and for filtering so that the color could be observed, also occasionally by a mill-wright for heating glue for repairs to leather belting. Chludzinski had no duties to perform in reference to that burner and the same was for the special use of two other men in the repair shop. The burner was located on a bench on one side of the locker room and there were lockers Nos. 1 and 2 at each end of that bench. The locker which was used by Chludzinski was about two feet from the end of the hood over the burner and about four and one-half feet from the burner itself.

On said date while Anthony Chludzinski was working for his employer at his employer's plant and at about 3.45 p. m. he went into the locker room for some unknown purpose. There was no rule of the company forbidding men to go to the lockers during working hours. He went into the room and closed the door after him and was in the room alone for five or six minutes and then rushed out of the room with the left front side of his shirt ablaze, thereby receiving injuries in the nature of second and third degree burns which caused his death the same day. The flannel shirts of all the men who worked in the factory become saturated with oil and very inflammable. There was a light in the Bunsen burner at the time he was in the room and there was found a burnt match stick on the floor. Direct contact with the Bunsen burner could not be had by accident as the hood over the same protected it from handling or touching except by design and intent.

The injuries which resulted in the death of Anthony Chludzinski were accidental injuries, and arose out of and in the course of his employment. This decision is based upon the following inference of fact: That the lighted match found was used by

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someone other than Chludzinski to light the Bunsen burner; this decision is further based on the presumptions created by section 21 of the Workmen's Compensation Law; and the question hereby decided is ordered to be certified to the Appellate Division; and this claim is continued for further hearing upon the coming in of the opinion of the Appellate Division.

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In the Matter of the Claim of WILLIAM A. AMESBURY, for Compensation under the Workmen's Compensation Law, against VACUUM OIL COMPANY, Employer and Self-Insurer

Claim No. 67472

(Decided August 15, 1916)

Injuries received by William A. Amesbury while employed as a laborer by the Vacuum Oil Company.

On March 24, 1915, while William A. Amesbury was employed as a laborer by the Vacuum Oil Company at Rochester, N. Y., he was taking barrels weighing 350 pounds each out of a cellar to be placed in a car when he sustained an acute dilatation of the heart. His average weekly wage was the sum of eleven dollars and fifty-four cents. An award was made.

Robert W. Bonyng, Chief Counsel to State Industrial Commission.

George E. Van Schaick, attorney for employer.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, award and decision as follows:

On March 24, 1915, the day when William A. Amesbury received his injuries, he resided at 360 Jefferson avenue, Rochester, N. Y., and was employed as a laborer by Vacuum Oil Company, a corporation engaged in the business of refining oil, with a plant and place of business at Rochester, N. Y.

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On said date while William A. Amesbury was working for his employer at his employer's plant and at about 11 A. M., he was engaged in taking some barrels of oil weighing about 350 pounds each out of a cellar to be put into a car to make up a carload of oil. He had gotten out all the barrels but two, which barrels were in the back of the cellar, and in order to get these barrels out, had to raise them on to a skid, a distance of about four inches. In doing so he received a severe strain and had a sudden attack of pain in the heart and marked shortness of breath. He later discovered that the strain of lifting had caused an acute dilatation of the heart. He continued to work the same day and also the next day, March twenty-fifth, but was unable to go home to dinner at the noon hour. On March twenty-sixth he worked a half day and then had to quit as he was unable to continue owing to the suffering from the injuries. He was thereafter continuously disabled from working by reason of the said injury until February 18, 1916, and on that date was still disabled. On August 8, 1916, Amesbury was examined by his employer's physician who found him at that time to be suffering from cordiac hypertrophy and marked valvular disease, and qualified him for the purpose of employment, as a "poor risk." This condition of the heart predisposed Amesbury to the condition above mentioned and was aggravated by the strain of lifting into an acute dilatation of the heart.

The average weekly wage of William A. Amesbury was the sum of eleven dollars and fifty four cents.

William A. Amesbury did not give written notice of injury to his employer within ten days of the accident but the employer has not been prejudiced thereby.

Award of compensation is hereby made against Vacuum Oil Company, employer and self-insurer, to William A. Amesbury, injured employee, at the rate of seven dollars and sixty-nine cents weekly for a period of forty-five weeks from April 9, 1915 to February 18, 1916, and this claim is hereby continued for further hearing.

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State Industrial Commission

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**In the Matter of the Claim of PETER S. GRANT, for Compensation under the Workmen's Compensation Law, against MORSE DRY DOCK AND REPAIR COMPANY, Employer and Self-Insurer**

**Claim No. 27459**

**(Decided August 22, 1916)**

**Injuries received by Peter S. Grant while employed as a riveter by the Morse Dry Dock and Repair Company.**

On September 9, 1915, while Peter S. Grant was employed as a riveter by the Morse Dry Dock and Repair Company, a corporation in the borough of Brooklyn, city of New York, he was putting a cement patch on a tank on board a ship in a dry dock when he fell about three and one-half feet into the hold of the ship, thereby straining himself and disabling him from work for forty-seven and one-half weeks. His average weekly wage was the sum of sixteen dollars and seventy-five cents. An award was made.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

Henry J. Hunter, attorney for employer.

**By THE COMMISSION.**—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, award and decision as follows:

On September 9, 1915, the day when Peter S. Grant received his injuries, he resided at 95 Sixteenth street, borough of Brooklyn, city of New York, and was employed as a riveter by Morse Dry Dock and Repair Company, a corporation engaged in the operation of a dry dock and in the business of repairing vessels, with a plant at the foot of Fifty-sixth street, borough of Brooklyn, city of New York.

On said date while Peter S. Grant was working for his employer and was engaged in putting a cement patch on some tanks

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on board a steamship in dry dock, which ship was being repaired by his employer, he slipped and fell a distance of about three and one-half feet into the starboard bilge hole in hold No. 2 of the ship, landing with a jolt on both feet, thereby straining himself and receiving a left inguinal hernia and also causing an acute dilatation of the heart and a consequent decompensation of that organ, by reason of which injuries he was disabled from working from the date of the accident until August 19, 1916, a period of forty-seven and one-third weeks, and on that date he was still disabled. Previous to the accident Peter S. Grant had a myocarditis which was aggravated and made acute by the accident.

The average weekly wage of Peter S. Grant was the sum of sixteen dollars and seventy-five cents.

Peter S. Grant reported his accident verbally to his superior on September 11, 1915, but did not give his employer a notice in writing. His failure to do so did not prejudice his employer.

Award of compensation is hereby made against Morse Dry Dock and Repair Company, employer, to Peter S. Grant, injured employee, at the rate of twelve dollars and fifty cents weekly for a period of forty-seven and one-third weeks from September 23, 1915, to August 19, 1916, and this claim is hereby continued for further hearing.

The failure of Peter S. Grant to give written notice of accident and injury to his employer within ten days from the happening thereof is hereby excused on the ground that such failure has not prejudiced the employer.

# ATTORNEY-GENERAL

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## In the Matter of Construing the ELECTION LAW, SECTION 54, Relative to Presidential Election

(Opinion dated August 16, 1916)

**Presidential electors are nominated by the State committees of the respective political parties which they represent.**

Although presidential electors are under the statute candidates for "an office to be filled by all the voters of the State" their designation, by petition, is not required but they are to be nominated directly by the State committee without petition.

Hon. Francis M. Hugo, Secretary of State, submitted an inquiry as to whether the amendments of the Election Law since 1912 require that candidates for presidential electors must be designated by petition before nomination by the respective state committees of the political parties.

WOODBURY, Attorney-General.— Since the year 1911 there has been in the Election Law without amendment the following:

"§ 54. *Presidential electors.* In each year when a president of the United States is to be elected, candidates for the office of elector for president and vice-president of the United States shall be nominated by the state committee of each of the parties to which this act applies, one for each congressional district, and two at large. The candidates so nominated shall be certified to the secretary of state in the same manner as party nominations for state officers."

Standing in the so-called Levy Election Law of 1911 and as amended in 1912, the meaning of this provision was clear and raised no question. Accordingly when electors were nominated for the presidential election of 1912, the respective state committees certified their nominees to the Secretary of State in substantially this form:

## Attorney-General

" TO THE SECRETARY OF STATE AT ALBANY, N. Y.:

" We certify that at a Meeting of the.....State Committee representing the.....Party, duly held at Saratoga Springs, on the twenty-fourth day of September, 1912, a political party which, at the last preceding general election at which a governor was elected, cast ten thousand votes in the State for such officer, the following named persons were placed in nomination for offices to be filled at the next ensuing general election.

Title of Office to be filled.	Name of the Candidate	Name of the Party	Place of Residence of Candidate.	Place of Business of Candidate.
" Elector at large				
" Elector				
" Dist. No.				
*   *   *   *   *   *   *   *				

.....  
*" Presiding Officer of Meeting.*

" Verification

" Endorsements

.....  
*" Secretary of Meeting."*  
 .....

The practice followed was in accordance with advice of this department.

It must be borne in mind, however, that the situation was then radically different from that existing today. In 1912 *official* State conventions were held at which the State officers were nominated by delegates designated by political committees or by petition and then elected at the primaries.

Our Primary Law during the intervening years has undergone sweeping revision. Now all State officers and the United States Senator are nominated directly by the enrolled voters after designation by petitions.

As carrying this out we have section 48 of the Election Law, last amended by Laws of 1916, chapter 537. This provides in part:

## Attorney-General

"§ 48. *Designation by petition.* Every petition for the designation of a candidate for party nomination or for election to a party position shall be in substantially the following form:

"I, the undersigned, do hereby certify that I am a duly enrolled voter of the.....party, as hereinbelow specified, and *entitled to vote at the next primary election* of said party, that my place of residence is truly stated opposite my signature hereto, and I do hereby designate the following named person, or persons, as a candidate, or candidates, for nomination by the .....party for public office, or offices, or as a candidate or candidates for election to the position or positions, of the said party *to be voted for at the official primary election to be held* on the ..... day of ....., A. D., ....., as hereinafter specified, and it is my intention to support at the ensuing primary the candidacy of the person or persons and each of them herein designated by me."

The same statute then provides that for a person to be a candidate for nomination in a primary he must be designated by a petition containing a certain number of signatures. It requires: "For the office of United States senator or for any office to be filled by all the voters of the state, three thousand signatures."

Although presidential electors are, under the terms of the last quoted provision, candidates for an "office to be filled by all the voters of the State," yet it is my opinion that their designation by petition is not required.

*First.*—Section 54 providing for their nomination directly by the state committees has remained unamended throughout the recent changes in the Primary Law.

*Second.*—The amendment to section 48 above quoted, specifically states that the designating petitions are for candidates "to be voted for at the official primary election."

If presidential electors are to be nominated at the primaries we deprive section 54, providing for their nomination by the state committees, of all meaning. It is obvious that this was never intended.

On the other hand, in view of the origin of section 54, we should



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Attorney-General

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not read into it the provisions relative to the designation of candidates later enacted, unless the intention is clearly expressed.

Nowhere in the statutes, as now existing, do I find a direction that the state committee must nominate presidential electors only from lists designated by enrolled voters.

Section 48 dealing with designations by petition deals, as I have said, simply with those candidates "to be voted for at the official primary election;" and as I have emphasized above, electors are still to be nominated by the state committees, if we are to give section 54 any meaning whatever.

Owing to the absence of legislative direction to the contrary, it is therefore my opinion that the presidential electors are to be nominated under the system in vogue in 1912 and without designations for such nomination by enrolled voters of the respective parties.

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**In the Matter of Construing SECTION 20 OF THE MILITARY LAW  
in Relation to the Membership of the State Armory Commission**

(Opinion dated September 1, 1916)

**The State militia on the Federal border do not become a part of the regular army of the United States.**

**The formation by the Governor of the second division National Guard New York, was legal within the provisions of section 30 of the Military Law.**

Under the provisions of section 20 of the Military Law the Major-General and the Adjutant-General of the State are made members of the State Armory Commission. The authority of the Major-General in this connection cannot be delegated. Judge-Advocate-General Crowder of the army in an opinion under date of July 29, 1916, held that the State Militia doing duty at the border do not become part of the army but remain as a part of the National Guard. *Held* that Major-General O'Ryan, therefore, retains his commission as Major-General of the State and retains that office with authority that cannot be delegated.

Under section 30 of the Military Law, the Governor is empowered in the case of war, insurrection, invasion or imminent danger thereof to increase the military forces in this State "and to organize the same as the exigencies of the service may require." *Held*, that under this authority the organization of the second division of the National Guard New York, by the Governor was within his powers as the sole judge of the existence of the requirements of the service.

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Attorney-General

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Col. Chauncey P. Williams, Colonel Adjutant General's Department, submitted under date of August 30, 1916, an inquiry as to who are the present members of the State Armory Commission under section 20 of the Military Law.

WOODBURY, Attorney-General.—Section 20 specifically mentions the Major General and the Adjutant General as members of this Commission. It seems to me very clear that the Major General refers to Major General O'Ryan and that his authority cannot be delegated. The Appellate Division has recently held that where the Legislature prescribes that an officer of the State is *ex officio* a member of a board or commission, he is made a member of that Commission personally and in the absence of express authority cannot delegate the function to his deputy or assistants. The Military Law throughout its provisions makes mention of "the Major General" and there is no reason to believe that the term is used in any different connection in section 20 than it is used throughout the statute.

While the militia at the border are in the service of the United States and while in such service subject to the laws and regulations governing the regular army, they are not a part of the regular army of the United States but continue as a part of the National Guard according to Judge Advocate General Crowder of the Army in an opinion rendered by him dated July 29, 1916. Major General O'Ryan therefore retains his commission as Major General of the State. An officer so long as he retains his commission, retains his office. *People ex rel. Leo v. Hill*, 126 N. Y. 497, 503.

Neither has he been removed from his office in the manner prescribed by the constitution. N. Y. Const. Art. 11, § 6.

The same is true of the Adjutant General of this State. He remains the Adjutant General and is not even under the jurisdiction of the Federal government or in the service of the Federal government. His office is connected with the National Guard but is not a part of it. There is therefore no question as to his continuance as a member of the Armory Commission.

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Attorney-General

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The Military Law, section 20, further provides that the commanding officer of the naval militia shall be a member of the Armory Commission. It is my understanding that such commanding officer is within the State and therefore no question arises with reference to his status as a member of the Armory Commission.

The only question left is with reference to that portion of section 20 which provides that, amongst others, "the commanding officer of the brigade whose headquarters are within the district where such property is located" shall be a member of this Commission. Here a different situation arises. I note from your letter that under an order from the Governor, all troops remaining in this State not mustered into the United States service, were constituted the Second Division, National Guard, New York, and that officers have been commissioned as the commanding officers or acting commanding officers of the various brigades. Under section 30 of the Military Law, the Governor is given the power in the case of war, insurrection, invasion or imminent danger thereof to increase the military forces in this State "and to organize the same as the exigencies of the service may require." It seems to me that under this authority the Governor had the power to constitute the Second Division and to commission the proper officers in charge of the various brigades and that under the literal construction of section 20 of the Military Law, each such officer is "the commanding officer of the brigade whose headquarters are within the district where such property is located." As I understand it, a Brigadier General who is now located at the border has his headquarters there, whereas a duly commissioned Brigadier General or acting Brigade Commander here in connection with the Second Division has his headquarters here. It therefore seems to me that the only common sense view of the situation is to maintain that a Brigade Commander having his headquarters here where the property is located is a proper member of this Commission. The sole object of his appointment is to care for local necessities and the care of the armory property of the State is a purely local matter, to be left to those in contact with it, and one to which the

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Attorney-General

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officers having headquarters at the border are precluded from giving adequate attention and perhaps none at all.

It is thus entirely proper that the officers placed by the Governor in command of the brigades within this State should be considered the members of the Commission within the statute and I believe that the statute is open to the construction that they are.

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In the Matter of Construing the PROVISIONS OF THE MILITARY LAW as to Whether New York National Guardsmen Now on Service for the Federal Government Along the Mexican Border are Entitled to State Pay in Addition to their Federal Pay

(Opinion dated September 14, 1916)

**Members of the National Guard are not entitled to any State pay while in the Federal service.**

Section 210 of the Military Law provides that each officer and enlisted man ordered for duty by the Governor or by the Major-General or the commanding officer of the Naval Militia shall receive certain pay therein specified for every day actually on duty except in several cases stated in that section. It is true that the enlisted guardsmen were in one sense "ordered for duty by the Governor" following the call of the President, as a matter of law they were ordered out by the President under the Constitution and laws of the United States. *Held*, that section 210 of the Military Law was not intended to cover service for the Federal Government but only service for the State under the orders of the Governor and that the militiamen at the border are not entitled to State pay.

Hon. Charles S. Whitman, Governor, forwarded an inquiry received by him from Brigadier General McCoskry Butt, submitting an inquiry as to whether the New York guardsmen now on service for the Federal Government along the Mexican border are entitled to pay from the State of New York at one dollar and twenty-five cents per day in addition to their Federal pay of fifty cents per day.

WOODBURY, Attorney-General.—I have carefully considered the question presented by Brigadier General McCoskry Butt as to whether the New York National guardsmen now on service for the Federal Government along the Mexican border are entitled to

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Attorney-General

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pay from the State of New York, one dollar and twenty-five cents per day, in addition to their Federal pay of fifty cents per day. I have concluded that they are not under the New York Military Law entitled to any State pay while in the Federal service.

Section 210 of the Military Law provides: "Each officer and enlisted man *ordered for duty by the governor* or under his authority by the major-general or the commanding officer of the naval militia shall receive the pay herein specified for every day actually on duty except when so ordered for inspection, muster, small arms practice, parade or review or field service not extending beyond one day; a private or a second-class private, a musician or a trumpeter, one dollar and twenty-five cents; \* \* \*."

While it is true that the enlisted guardsmen were in one sense "ordered for duty by the Governor" following the call of the President, they were in law ordered out by the President under the Constitution and laws of the United States pursuant to the following provision of the Federal statutes: "Whenever the United States is invaded, or in danger of invasion from any foreign nation, or of rebellion against the authority of the Government of the United States, or the President is unable with the regular forces at his command to execute the laws of the Union, it shall be lawful for the President to call forth such number of the militia of the State or of the States or Territories or of the District of Columbia as he may deem necessary to repel such invasion, suppress such rebellion, or to enable him to execute such laws, and *to issue his orders for that purpose, through the governor of the respective State or Territory, or through the commanding general of the militia of the District of Columbia, from which State, Territory, or District such troops may be called, to such officers of the militia as he may think proper, (35 Stat. 400).*"

Furthermore it is readily demonstrable that although the words "ordered for duty by the Governor" in section 210 of our Military Law upon first observation lend themselves to an interpretation which would give to the militiamen State pay in the present situation, the words do not upon more extended examination seem to sanction State pay of militiamen except when they are *ordered for State service by the Governor.*

Attorney-General

We are not aided by any precedents of the Civil or Spanish war. By chapter 477 of the Laws of 1862, section 173, it was provided that: "The military forces of this state, *when in the actual service of the state* in time of war, insurrection, invasion, or imminent danger thereof, shall, during their time of service, be entitled to the same pay, rations and allowances for clothing as are or may hereafter be established by law for the army of the United States."

The above law was in effect when President Lincoln called out the New York State militiamen in the early years of the war, and many of the companies thereafter became volunteers in the United States army, so that both under the language of the statute and from the fact that the men entered the United States army as volunteers, no State pay was received by them while in the service of the Federal government.

The statute remained substantially in the same form until the enactment of chapter 299 of the Laws of 1883 which repealed the former statute and provided as follows (§ 92): "There shall be paid to such officers and enlisted men as *shall be ordered for duty by the Commander-in-Chief in pursuance of the provisions of this act*, the following sum each, for every day actually on duty: To all musicians and privates, one dollar and twenty-five cents \* \* \*."

After several mesne amendments of no moment chapter 212 of the Laws of 1898 presented the law with respect to the pay of militiamen in the following form (§ 151): "Each officer and enlisted man *ordered for duty by the governor*, or under his authority, by the commanding officer of the national guard or the commanding officer of the naval militia, shall receive the duty pay herein specified for every day actually on duty, except when so ordered for inspection, muster or rifle practice, or parade or review or field service not extending beyond one day; a musician or private, one dollar and twenty-five cents: \* \* \*."

The above is, except for minor changes, the same language as is now contained in section 210 of the Military Law hereinbefore first referred to. No interpretation of the section occurred in 1898 for the reason that the militiamen entered the United States

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Attorney-General

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army during the Spanish war as volunteers and did not serve as State militiamen under call of the President.

The change in the statute made in 1883 (from "when in the military service of the State" to when "ordered for duty by the commander in chief") does not impress me as intending to alter the rule with respect to the pay of the militia, that is, the amendment was not intended to secure for the militia State pay while engaged in the service of the Federal Government. The new phrase was used rather to contradistinguish service for the State *under order of the Governor* from service for a county or city "pursuant to the *order of the sheriff*" "or the Mayor" in case of riot, tumult, breach of the peace, etc., under which later conditions the county and not the State was obliged to meet the compensation of the militia at the same rate as was provided for State service. Laws of 1883, § 95, chap. 299, now Military Law, § 211.

The above conclusion seems the correct one especially in view of the fact that the statute of 1883, which altered the language to make it read when "ordered for duty by the commander in chief," repealed at the same time section 168 of an act of 1870 (Chap. 80) which provided State pay to officers of the militia for certain limited duties "*while in the service of the United States.*" Section 168 reads as follows: "In case of war, insurrection, rebellion or invasion, or imminent danger thereof, when the military forces or volunteers of the State of New York, or any part thereof, shall be in the actual service of the State, or *in the service of the United States*, the staff of the Commander-in-Chief, while on duty, the assistants in the several departments, and such other officers as may be detailed by the Commander-in-Chief for the performance of any duties connected with the recruiting, mustering, enrolling, equipping, arming, organizing, paying, inspecting, providing and administering justice for such forces and volunteers, shall, in lieu of all other allowances under this act, be paid such reasonable and just compensation, not exceeding the full pay and allowances of officers of the same rank in the army of the United States, as the Commander-in-Chief shall deem proper, together with their necessary expenses and those of their departments, to be paid by the State upon the certificate of the

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Attorney-General

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Commander-in-Chief showing a detailed statement of such services and expenses."

A further observation may be made. It would appear incongruous that the State should propose to pay the militiamen from the State treasury while they are in the service of the Federal government (and it may be an extended service) and while they are *receiving pay from that government*, and yet while they are in the short service of cities and counties, subdivisions of the State itself, refuse to pay them from the treasury and place that burden entirely upon the localities.

We note also that pensions are given under our Military Law only when men are wounded or disabled "in the service of the State" (§ 220), and that section 210 directs that all commissioned officers shall be entitled to and shall receive *the same pay* and allowances as commissioned officers of the army or navy of the United States of equal grade and term of service. If the military officers are to receive the same pay as like officers in the United States army or navy they could not if we attempt to apply section 210 to Federal service receiving both State and Federal pay; for they would then not be receiving the *same pay* as the United States army or navy officers. It results that section 210 does not intend to cover service for the Federal government but only service for the State under orders of the Governor.

The militiamen at the border are not in my opinion entitled to State pay.

In view of the small compensation paid the private soldiers and musicians by the Federal government and the further fact that many of them are married men having families for whom they provide, it would give me very great pleasure if I could find some statute or rule of law which would justify the payment of the one dollar and twenty-five cents per day while they are absent upon the border, but the Attorney-General does not make the law, and it is his duty to construe and administer it as it has been enacted by the Legislature without being influenced by sympathy or personal desire.



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Attorney-General

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**In the Matter of Construing the TAX LAW, SECTIONS 181 AND 182  
as to Taxing a Corporation Organized Under the Laws of  
Another State**

(Opinion dated September 15, 1916)

**Taxation in this State of the American District Telegraph Company, a New  
Jersey corporation operating in this State.**

The holding by a corporation of the stocks of other corporations whose physical property is located within this State represents the employment of capital within this State but does not constitute in and of itself the doing of business within the State. The American District Telegraph Company is organized as a New Jersey corporation and operates entirely within that State. It is, however, a holding company but does not operate as a telegraph company in any State but controls approximately seventy-nine subsidiary companies. These subsidiary companies are incorporated under the laws of the several States and are the operating companies. All contracts are made and services rendered by the local companies in the several States. The holding company has no property in this State and claims that it is doing no business in this State although the offices of its general officers are in New York city. *Held*, that under the ruling of the Court of Appeals in *People v. American Bell Telephone Company*, 117 N. Y. 246, the holding company is not doing business within this State within the meaning of the Tax Law. The New York cases relating to the point involved examined and discussed. If, as a matter of fact, however, the American District Telegraph Company has its New York office, makes and holds investments, receives and disburses its income from its investments in the subsidiary companies doing business within this State, depositing its income here and pays its obligations from such deposits in the form of dividends, office disbursements and incidental purposes, then it is doing a part of its appropriate business as an investment company within this State and is employing its capital to that extent at least within the meaning of sections 181 and 182 of the Tax Law.

N. W. Canfield, Assistant Deputy Tax Commissioner, submitted an inquiry as to whether the American District Telegraph Company, a corporation organized under the laws of New Jersey is taxable in this State.

WOODBURY, Attorney-General.—I have been examining the question submitted by you in your letter of August eighteenth, in which you request an opinion regarding the taxability, under

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Attorney-General

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sections 181 and 182 of the Tax Law, of the American District Telegraph Company, a corporation organized under the laws of the State of New Jersey.

One question involved is — Does the holding of stocks of other corporations whose physical property is located within the State of New York constitute doing business within the State of New York? From my examination of the law, it seems to me that the holding of such stock represents the employment of capital within this State but does not constitute in and of itself the doing of business within the State.

The most difficult question is the determination upon the facts presented by you whether the American District Telegraph Company is taxable under sections 181 and 182 of the Tax Law.

According to extracts from a letter received from the tax attorney for the American District Telegraph Company, that company was organized some years ago under the laws of New Jersey and it has confined its operations as a corporation entirely to that State. It is in the highest sense a holding company. It does not operate as a telegraph company or in any other way either in the State of New Jersey or in any other State. It has the control of approximately seventy-nine subsidiary companies. These subsidiary companies are incorporated under the laws of the various states and are the operating companies. All tax reports for companies in New York are annually filed with the State Tax Department at Albany.

Mr. William L. Jacoby is president of the American District Telegraph Company and of all or nearly all of the seventy-nine subsidiary companies. Mr. F. J. McLain is the Secretary or Assistant Auditor of all or nearly all of these companies.

The New Jersey company is making no contracts whatever for any of the service performed by its subsidiary companies, that is, burglar alarm, fire alarm, night watch, sprinkler supervisory and kindred services. All contracts are made and all services are performed by the subsidiary local State companies. The American District Telegraph Company of New Jersey has no property in the State of New York and it is claimed that it is doing no business

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Attorney-General

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whatever in this State although the offices of Mr. Jacoby and Mr. McLain and of the treasurer, Mr. Lewis Dresdner are at 195 Broadway, New York city.

It is claimed that at one time the New Jersey Company endeavored to take out a license in the State of New York but it was refused that privilege on account of the exact similarity of name to other New York corporations. It never pursued the matter further.

The Court of Appeals seems to have decided this question under the statute of 1880, chapter 542, and unless the amendments of the statute since that time would authorize a different expression of opinion from that court, it would seem that the company is not doing business within this State within the meaning of the Tax Law. *People v. American Bell Telephone Company*, 117 N. Y. 246. In that case, the American Bell Telephone Company was a Massachusetts corporation which did no business in this State except by leasing and licensing the use of its telephones by contracts with certain corporations in this State, the business being conducted by the local companies, although the American Bell Telephone Company was largely instrumental in procuring the organization of the local companies and subscribed largely to their capital stock. It was held that that company was not carrying on business in the State within the meaning of the Tax Law but that the business was carried on by the local companies in their own right and not in any just sense as agents for the American Bell Telephone Company.

The converse of the above case seems to be found in *People ex rel. Edison Electric Light Company v. Wemple*, 63 Hun, 444. In that case, it appeared that the Edison Company was a New York corporation. Substantially all of its capital stock was invested in patent rights and in the stock of various State and foreign corporations received from them in return for the right to use its patents. The Electric Light Company did not itself employ these patent rights in the furnishing of light but only sold them at its office in the State of New York and whatever use was made of them was by its licensees nor did it furnish light in

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Attorney-General

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any of the various places where the licensed corporations did business. It was held that all the capital stock of the corporation was employed within this State. The court followed the decision in the American Bell Telephone Company by holding that the investment of its capital stock in the securities of other companies was not employing it in the business of those companies and that since all of its business dealings were carried on in the State of New York by the sale of its patent rights to these other companies, all of its capital stock was subject to tax in the State of New York; that the tax was upon the franchise or business and that the manner of investment did not relieve the corporation from the tax.

The Court of Appeals modified the determination of the general term in the above case 148 N. Y. 690, by reversing it so far as it included for the purposes of taxation the stocks held by the relator in foreign corporations holding that only so much of its capital as was invested in stocks in corporations organized and existing in this State was its capital employed within this State. It was held that so much of the relator's capital as was invested in companies outside of the State was not employed within this State. It was held to have been invested outside of the State and that its property in those corporations represented by its shares of stock was outside of this State and was in no sense employed here. That those stocks had no situs here and were not taxable here under any system of taxation which had ever existed in this State.

The rule laid down was that capital is employed where it is kept and used for the purposes of the corporation and within that rule it was further determined in that case that there was a distinction between the stocks held by it in foreign corporations and the bonds of such foreign corporations which were issued to it in payment for patent rights granted. It was held that so much of the capital as was invested in such bonds was taxable here on the ground that the bonds have their situs at the domicile of the owner. The bonds took the place of the patent rights granted for their purchase. The court said they were kept and held here to earn revenue for the relator and they were in a proper sense employed here for that purpose.

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Attorney-General

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In the case of *People ex rel. Fabrik v. Roberts*, 152 N. Y. 59, the Court of Appeals held that a foreign corporation is deemed to be engaged in business in this State within the meaning of the Tax Law of 1880, chapter 542, when it becomes a special partner within a limited partnership within the State which is the sole agent for the sale of its products in this country and held that it was liable to taxation on the amount of capital which it contributed to the partnership as capital stock employed in this State.

Judge O'Brien dissented on the ground that the case could not be distinguished from the *American Bell Telephone Company* case. The majority opinion does not pretend to overrule the decision in that case and it seems to me the case can be distinguished upon the theory that as a partner even with limited liability and limited powers, the foreign corporation was, in a very definite sense, engaged in the business whereas as a stockholder it was simply an investor. The court said that as a special partner it was a member of the agency selected to sell its products. "While as a special partner, it may be under limitations and restrictions with respect to partnership powers yet the relator is present here as a member of the partnership, \* \* \* in that guise, it is employing some portion of its capital and the question in reality becomes one of the nature of the agency availed of by the relator for the purpose of carrying on its business of marketing its manufactured products within this State. It has in effect by this method of limited partnership established a place within this State for the doing of a part of its business and though I come to the conclusion with some hesitation, I think that it may be regarded as coming within the operation of the statute."

It is apparent that the Court of Appeals reached its decision in that case with hesitation but upon the grounds stated is distinguishable from the *American Bell Telephone Company* case which would seem to be the law in the case submitted here unless the amendment of the statute has created a different status.

In *Powell's Taxation of Corporations*, pages 256 and 257, the author expresses the opinion that the *American Bell Telephone Company* case has been overruled by the amendment of 1906 upon the theory that the present statute, in both sections 181 and

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182, expressly declares that "For the purposes of taxation the capital of a corporation invested in the stock of another corporation shall be deemed to be assets located where the physical property represented by such stock is located."

I am not sure that that was the intent of the statute. We are considering the question whether a foreign corporation is doing business in this State at all and from the nature of its connection, the amendment of 1906 may have been intended to relate only to the previous sentence in sections 181 and 182 for the purpose of allocating the assets of a corporation which was, in fact, doing business in this State, in order to determine the measure of the amount of its capital stock employed in this State.

If it were intended to apply to a holding company for the purpose of declaring that its capital stock should be deemed to be employed where the physical property represented by its stock investments is located, more appropriate language would have been used, it seems to me. In the previous sentence, the statute declares that "The measure of the amount of capital stock employed in this State shall be such a portion of the issued capital stock as the gross *assets* employed in any business within this State bear to the gross *assets* wherever employed in business." The next sentence which is the amendment in question states that the capital of a corporation invested in the stock of another corporation shall be deemed to be *assets* located where the physical property represented by such stock is located. Being used in connection with the previous sentence, it seems to me that the intent was to limit its application to that and not for the purpose of taxing every foreign corporation that may hold stock in corporations doing business in this State irrespective of whether such foreign corporation was or was not actually doing business itself within this State. If a foreign corporation is actually licensed within this State and is doing business within this State, it seems to me that the amendment of 1906 would become applicable but in the absence of a license to do business in this State or in the absence of any actual business done within the State, it seems to me it has no application.

The only question left is the determination whether the American District Telegraph Company is actually doing business

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Attorney-General

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within this State by reason of the fact that its president, secretary and treasurer have offices in New York city or by reason of any other facts not shown in the letter from that company. It seems to me that the location of its offices in this State is indicative of the doing of business within the State. The Court of Appeals has held recently, in *Pomeroy v. Hocking Valley Ry. Co.*, 113 N. E. Rep. 504, that a foreign corporation, which had never obtained permission to do business in the State and had its property and principal office entirely outside the State, maintaining no business agents within the State, but holding meetings of its board of directors therein, and there keeping the office of its secretary who conducted correspondence and transfers of stock in such office, that it was doing business within the State so that its secretary could be served here in a civil action.

It is entirely likely that the holding company in the question submitted is doing business in a substantially similar manner. The question must be decided upon the particular facts in each case. But the reasoning of the Court of Appeals in the *Pomeroy* case, just cited, seems to be equally applicable here. The court said at page 506: "The defendant comes within the application of these considerations. It must be assumed that when its board of directors and executive committee were meeting in the state of New York they were there exercising supervision over its management and business and providing for the successful transaction of the latter; that when the secretary permanently resided and had his office in that city it was for the purpose of discharging duties which were incidental and necessary to the transaction of its business; that when the treasurer there paid obligations and dividends of the company he obviously did so for the purpose of enabling the corporation to maintain its existence and carry on the business for which it was organized.

All of these duties were being discharged in order that the corporation might own and operate its railroad and secure and transact its regular business, and through these boards, committees, and officials the corporation was transacting business at the place where they had their offices, held their meetings, and discharged their duties."

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Attorney-General

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It thus seems to me that the American District Telegraph Company is doing business in this State and if it is doing business in this State, it seems to me that the amendment of 1906 applies as to the measure of that business.

This may be too strict a construction of the statute and it may be wise to endeavor to give it a broader application in view of the facts expressed with reference to it by Powell on Taxation of Corporations.

In the case of *People ex rel. Chicago Junction Railroad Company v. Roberts*, 154 N. Y. 1, it was claimed that that company, organized for the purpose of investing its capital in the purchase of stocks and bonds in the Union Stock Yard and Transit Company, an Illinois corporation, with its whole capital invested in the stocks and bonds of that corporation, was not doing business in this State. The court said at page 5: "It may be conceded that the relator in keeping an office in the City of New York where it received and disbursed its income derived from its investment in the Illinois corporation depositing it in bank and drawing upon the deposit for the payment of obligations, dividends to shareholders and disbursements in maintaining its office was doing part of its appropriate function as an investment company and that this was 'doing business within the State' which satisfied that condition of the statute."

The relator in that case was a foreign corporation and therefore was held not employing its capital here even though it were doing business within the State. The distinction is carefully drawn between doing business and employing capital. In order that the tax may stand, it is necessary to show both the doing of business and the employment of capital. In a case where a real estate corporation was organized for the purpose of merely holding real estate as a speculation, the Court of Appeals said in *People ex rel. Vandervoort v. Glynn*, 194 N. Y. 387, 390: "the capital stock of the relator is employed rather than invested. It is being used for the precise purpose specified in the certificate of incorporation. The capital stock has been applied to the very use contemplated by the incorporators as the object of the incorporation."



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Attorney-General

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If this is not the employment of the capital stock, then it is impossible to conceive how the capital stock of such a corporation can ever be regarded as being employed at all."

If, as a matter of fact, the American District Telegraph Company, at its office in the city of New York, makes and holds its investments for the purposes for which it was organized, receives and disburses at such office its income derived from its investments in subsidiary companies doing business within this State, depositing its income in banks here and drawing upon the deposits for the payment of its obligations in the way of dividends to its shareholders, disbursements in maintaining its office, and transacting other business for which it was organized or reasonably incident thereto, it is doing a part of its appropriate business as an investment company within this State within the cases of *Pomeroy v. Railway Co.*, 113 N. E. Rep. 504, and *People v. Roberts*, 154 N. Y. 1, and is employing its capital to that extent at least within this State, within the case of *People v. Glynn*, 194 N. Y. 387, and also the precise terms of sections 181 and 182 of the Tax Law.

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In the Matter of Construing the TAX LAW, SECTION 36-a as to the Proper Application of a Corporation Owning Real Property in More Than One District in a County to Have Their Assessment Reviewed

(Opinion dated September 15, 1916)

Such corporation need not protest on the regular grievance day but may be heard on a subsequent date not later than August thirty-first.

Section 36-a has no provision fixing the time for making an application for review in the case of a corporation owning real property in more than one tax district in a county and it clearly has the right to have a date fixed for the hearing at any time up to and including the thirty-first day of August. Tax statutes are to be considered most favorably to the taxpayers and the petitioner should have been permitted to make its application even subsequent to the regular grievance day. The date between the grievance day and September fifteenth is intended to be devoted to the correction of the roll. In this case the assessors should make the necessary corrections and review the roll.

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Attorney-General

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Hon. Walter H. Knapp, State Tax Commissioner, submitted an inquiry under date of September thirteenth as to the proper interpretation of section 36-a of the Tax Law.

WOODBURY, Attorney-General.— This new section is simply an embodiment of a portion of old section 36 which has been the law of the State for some time. I fail to find, however, that the question which you raise has ever been directly passed upon by the courts. I have found two decisions, however, which lead me to the conclusion that the application of a corporation having real property in more than one tax district in a county to review their assessment need not appear or file protest on the regular grievance day but may subsequently make an application provided it will permit the fixing of a date not later than the thirty-first day of August for such a hearing.

I wish to refer you to the case of *Matter of Cathedral of the Incarnation*, 91 App. Div. 543, and *People v. Supervisors of Westchester*, 15 Barb. 607, 614. In the former case, the court held it improper for the board of assessors to decline to hear the petitioner's protest on the ground of its being too late where the petitioner appeared on the day following the grievance day. It is true that the facts in that case were more in favor of the petitioner than those which you allege in view of the fact that the notice published by the assessors fixed the grievance day as "the first day" for the presentation of protests and thus lulled the petitioner to sleep, but the court seems to clearly take the position in its opinion that the statute does not in terms prevent the assessors from entertaining a protest after the grievance day. Under sections 36, 37 and 39 of the Tax Law, the assessors have the time intervening between the third Tuesday of August and the fifteenth day of September, to revise and finally to complete their rolls. Section 290 of the Tax Law does not prescribe that the application must be made on the first day named in the notice or on the third Tuesday of August or on any specified day. It reads: "Such petition must show that application has been made in due time to the proper officers to correct such assessment." As the court said in *Matter of Cathedral*: "It cannot be presumed that an applica-

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Attorney-General

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tion made on August 19th (the day after grievance day) was not made in due time so far as the opportunity for hearing and correction is concerned. Section 35 (now section 36) which authorizes adjournments from time to time is almost conclusive upon this point. By the statute, the third Tuesday of August is simply made the day when the assessors will meet 'to review their assessment.' There is no provision of the law that complaints must be made upon that day or be forever barred while Section 36 (now Section 37) prescribes that the assessors shall meet at that time and at the place specified in the notice of completion of the assessment roll to *hear and determine* all complaints and *for that purpose* may adjourn from time to time."

And the court further says at page 547: "Aside from the provision of the statute relative to adjournments, there is authority for holding that the assessors at that time upon application would have had jurisdiction to correct the assessment in the absence of a statutory prohibition to the contrary." Citing *People v. Supervisors of Westchester*, 15 Barb. 607, 614.

If the court was moved to favor the petitioner in that case and if that be the law in such a case, it seems even clearer in the case which you state that the application should have been entertained. There is no provision in section 36-a fixing the time for making such an application and the statute clearly gives the right to have a date fixed for the hearing subsequent to the regular grievance day and not later than the thirty-first day of August. The courts have usually construed taxing statutes most favorably to the taxpayer and in the light of the decisions which I have called to your attention, I see no reason why the petitioner should not have been permitted to make its application even though subsequent to the regular grievance day. The fact that the assessors have finished and verified their roll prior to the application, was no ground for refusing to entertain it. Section 38 does not prescribe any specified day upon which to verify the roll and the statute seems to presume that the time between the grievance day and the fifteenth day of September shall be devoted to the correction of the roll. If it is verified prior to the first of September, at least, I see no reason why that should preclude the assessors from making necessary corrections and re-verifying the roll.

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Attorney-General

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**In the Matter of Construing the TAX LAW, SECTION 260, as Added  
by Chapter 335 of the Laws of 1916**

(Opinion dated September 18, 1916)

The provisions of section 260 of the Tax Law do not apply retroactively, however, the Court of Appeals would be apt to be very liberal in view of this provision.

Section 260 of the Tax Law provides for the filing of a statement by a mortgagor or mortgagee or owner of any bonds to be secured by a mortgage covering property within and without the State with the recording officer where such mortgage was first recorded and upon the payment of a tax upon the property without the State covered by such mortgage, the entire mortgage to be taxed shall be exempt for all other purposes. Section 260 contains a further provision that the entire tax may be paid in full waiving a determination as to the amount represented by property within the State. Many corporations have made such waivers and the question is now raised as to the effect of the payment of this tax prior to the amendment of this year. In a doctrine in the case of *People ex rel. American & Foreign Marine Insurance Company v. Sohmer*, 163 App. Div. 778, may be gathered some idea of the length to which the court will go in order to effect equality in the application of the amendment.

Hon. Walter H. Knapp, State Tax Commissioner, submitted an inquiry as to the construction to be placed upon a new section 260 of the Tax Law as added by chapter 335 of the Laws of 1916.

WOODBURY, Attorney-General.—New section 260 of the Tax Law in part provides for the filing of a statement by the mortgagor or mortgagee or owner of any bonds secured by a mortgage covering property within and without the State with the recording officer where such mortgage was first recorded and upon the payment of a tax upon the property without the State covered by such mortgage, the entire mortgage to be tax exempt for all other purposes.

Section 260 further provides that upon the recording of any such mortgage, the mortgagor or mortgagee may pay the tax in full waiving a determination as to the amount represented by property within the State and thereafter the whole amount of

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Attorney-General

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such mortgage or advancement thereon shall be exempt from taxation.

It seems from your letter that many corporations have made such waivers and paid the entire tax in the belief that the bonds secured by the mortgages would be exempted thereby from taxation and the question is as to the effect of the payment of this tax prior to the amendment of this year.

A strict construction of the amendment made by chapter 335 of the Laws of 1916 would lead me to the conclusion that there is no authority for the application of the amendment retroactively. The exemption granted thereby is given no retroactive effect by the language used and since "the exemption must be regarded as a privilege, the right to it will not be presumed but must be found to fall fairly within the language of the statute and the language of the statute will not be extended by any doubtful interpretation to cover a right of exemption" as I stated to you in my opinion of October 13, 1915.

I am reluctant, however, to give the language of the section this strict construction since it seems to be repugnant to justice and equality and I am inclined to feel that the courts would be apt to take the same view that was taken by them in the case of *People ex rel. American & Foreign Marine Insurance Company v. Sohmer*, 163 App. Div. 778, which was affirmed by the Court of Appeals without opinion.

The court in that case permitted an insurance company holding state bonds to have the benefit of a deduction from the amount of their tax provided for in an amendment of the statute although it had paid its tax before the date of the amendment. While the facts are not precisely the same, the court's determination was somewhat influenced by a desire to work out an equality saying: "The Comptroller should have acted upon this principle for no canon of construction requires a statute to be so read as to work out inequality or injustice." If your department desires to save the enormous amount of labor in your mortgage tax bureau which would be involved in a proceeding for reimbursement and then filing a new statement under the last paragraph of Section 260, it may be that you would be justified in accepting the reasoning

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Attorney-General

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of the court in the case to which I have referred you. I do not think it is precisely in point but it is some indication of the lengths to which the court will go in order to effect equality in the application of the amendment.

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**In the Matter of Construing the ELECTION LAW, SECTIONS 331 and 339, as to the Form of Ballot to Be Used in Voting upon a Proposition to Change the Site of a County Jail**

(Opinion dated September 21, 1916)

**A proposition to change the jail site is necessarily a county proposition and not a town proposition.**

As a matter in which the whole county is interested and it being, therefore, a county question, the jail site proposition must be submitted to the voters upon the same ballot which contains the constitutional amendments and other questions submitted.

The Commissioners of Election at Cortland, N. Y., submitted an inquiry as to whether a proposition to change the site of the county jail could be placed on the same ballot with the constitutional amendments and propositions.

WOODBURY, Attorney-General.—Section 331 of the Election Law directs that “there shall be five kinds of ballots called respectively ballots for presidential electors, ballots for general officers, ballots upon constitutional amendments and questions submitted, ballots upon town propositions and ballots upon town appropriations, which shall be used for the purposes which their names severally indicate, and not otherwise.”

Therefore we must conclude that the proposition to change the site of the county jail must be placed upon one of the five ballots above enumerated.

Under section 332 of the Election Law, subdivision 5, clause 4, we find a specific direction that “all ballots for the submission of town propositions for raising or appropriating money for town purposes, or for incurring a town liability to be voted at any town meeting in any town, shall be separate from all other ballots for the submission of other propositions or questions to the electors of such town, to be voted at the same town meeting or election.”

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Attorney-General

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The proposition which you are to submit at the coming election is not a town proposition or one for the appropriation of money for town purposes, but on the contrary is a county proposition to be submitted to and voted upon by the electors of the whole county. Therefore it becomes evident that from the five separate ballots above enumerated the question of changing the site of the county jail must be submitted to the voters upon the ballot which contains the constitutional amendments and other questions submitted.

This question was adjudicated at a Special Term of the Supreme Court in Matter of the Application of Arnold for a Special Town Meeting in the Town of Plattsburg, wherein Justice Dunwell rendered an opinion in which the court stated that it was proper and legal to place the questions relating to local option on the same ballot with the proposed constitutional amendments "as the Election Law expressly provides that all such questions shall be submitted upon the same ballot." 32 Misc. Rep. 439.

The proposition to change the site of the county jail of Cortland county should be placed upon the same ballot with the constitutional amendments and propositions to be submitted to the voters of the State at large, giving it on said ballot its proper number.

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In the Matter of Construing the COUNTY LAW, SECTION 23,  
Relative to the Pay of Supervisors for Copying on a Copy of  
the Assessment-Roll Each Extension of a Tax as Made on the  
Original Tax-Roll

(Opinion dated September 23, 1916)

The supervisors of a town to be allowed one-half the compensation authorized for making a copy of the assessment-roll on tax-roll.

The supervisors of the county of Suffolk made copies of the assessment-roll, each for his town, for which they have been paid at the full rates and afterward copied the extensions appearing upon the original tax-roll, upon the copy of the assessment-roll as made by them. *Held*, that under section 59 of the Tax Law, the board of supervisors have authority to have a copy of the tax-roll prepared for delivery to the collector of taxes, if the supervisors do not use the original tax-roll for delivery to the collector.

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Attorney-General

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George M. Goodale, Clerk of the Board of Supervisors of Nassau county, under date of September 25, 1916, submitted an inquiry as to whether supervisors are entitled to one-half cent for copying on a copy of the assessment-roll such extension of a tax as made on the original tax-roll.

WOODBURY, Attorney-General.—The determination of this question involves the interpretation of a portion of section 23 of the County Law.

“§ 23. \* \* \* The board of supervisors of any county, except Saratoga and Suffolk counties, may also allow to each member of the board for his services in making a copy of the assessment-roll, three cents for each written line for the first one hundred lines, two cents per line for the second hundred written lines, and one cent per line for all written lines in excess of two hundred, and one cent for each tax actually extended by him on the tax-roll, and, if there be more than one item of tax on a line of the tax-roll, one cent for computing and extending the total of such items. The board of supervisors of any county may also allow to each member of the board for his services *in making a copy of the tax-roll* for delivery to the collector compensation at the rate of *one-half the compensation authorized for making a copy of the assessment-roll and tax-rolls.* \* \* \*.”

You state that the supervisors made a copy of the assessment-roll, for which they have been paid at the full rates provided above for copying lines of the assessment-roll. They afterward copied the extensions appearing upon the original tax-roll, upon the copy of the assessment-roll they had made. For the latter work they claim they have not been paid, and ask compensation for such service at half the rate allowed for their work in extending the taxes on the original roll. I am of the opinion that they are not entitled to be paid for copying the extensions on this roll.

Section 58 of the Tax Law directs that a copy of the tax-roll shall be delivered to the town clerk. This is presumably the reason for authorizing the making of a copy of the assessment-roll, So that when the extensions of taxes on the original tax-roll are placed upon the copy of the assessment-roll so made, that copy



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Attorney-General

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becomes a copy of the tax-roll for filing in the town clerk's office. For making the copy of the assessment-roll the supervisors may be allowed compensation at three cents for each written line for the first one hundred lines, two cents per line for the second hundred lines, one cent per line for all lines in excess of two hundred; and for extending the taxes on the *original* tax-roll they are allowed one cent for each tax actually extended and one cent for extending a total if there is more than one item of tax. But no compensation seems to be allowed for *copying* the extensions upon this particular copy of the assessment-roll. No doubt compensation for such service, since it is merely copying work, was deemed to be included in the allowance for copying the lines of the assessment-roll.

Section 59 of the Tax Law authorizes the board of supervisors to have a copy of the tax-roll prepared for delivery to the collector of taxes if the supervisors do not use the original tax-roll for delivery to the collector. It is, I believe, for service in making this particular copy of the tax-roll that half rates are permitted by section 23 of the County Law hereinbefore quoted and here repeated: "The board of supervisors of any county may also allow to each member of the board for his services in making a copy of the tax-roll *for delivery to the collector* compensation at the rate of one-half the compensation authorized for making a copy of the assessment and tax-rolls."

That the Nassau county officials inadvertently delivered to the collector the copy of the tax-roll which should have been sent to the town clerk, does not perforce its having been delivered to the collector draw to its preparation the compensation, or any part of it, referred to in the statute for preparing a copy of the tax-roll for the use of the collector.

I have not entered upon the question whether the board of supervisors had any power to order a copy of the tax-roll, as I assume the situation arose prior to the Nassau county tax act of 1916 which does not authorize the making of a copy of the assessment or tax-rolls.

Attorney-General

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In the Matter of Construing the ELECTION LAW, SECTIONS 393,  
397, 408 and 414, Relative to Presidential Electors

(Decided October 3, 1916)

**Use of voting machines — under what circumstances and in what manner they can be legally used.**

Presidential electors may be voted for on the voting machine without placing the names of such electors in separate spaces thereon.

Voting machines cannot be legally used for the general ticket and a regular paper ballot for presidential electors at the same polling place.

Where a candidate is nominated by more than one party, his name must appear but once on the voting machine ballot.

Hon. Frederick L. Marshal, State Superintendent of Elections, submitted three inquiries as to the use of voting machines at the coming presidential election.

“ 1. Can the ballot for presidential electors be voted on voting machines without placing the names of the presidential electors thereon ?

“ 2. Is it legal to use the voting machine for the general ticket, amendments and questions submitted, and a separate paper ballot for presidential electors ?

“ 3. Can the name of a candidate nominated by more than one political party appear more than once on the face of the voting machine ? ”

WOODBURY, Attorney-General.— A voting machine before it can be adopted for use at elections must be examined by the State Board of Voting Machine Commissioners who report on its accuracy, efficiency and capacity to register the will of voters. Election Law, § 391. Before such voting machine can be approved by the State Board of Voting Machine Commissioners the mechanism thereof must comply with all the requirements set forth in section 392 of the Election Law, which are, in substance, that it must provide facilities for voting for such candidates as may be nominated; that it must permit an elector to vote for any person

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Attorney-General

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for any office whether or not nominated as a candidate by any party or organization and must permit voting in absolute secrecy; that it must be so constructed that an elector cannot vote for a candidate or on a proposition for whom or on which he is not lawfully entitled to vote; that it must prevent voting for more than one person for the same office, except where he is lawfully entitled to vote for more than one person for that office. It must afford the voter an opportunity to vote for as many persons for an office as he is by law entitled to vote for, and no more.

Said section 392 of the Election Law further provides that the voting machine "may also be provided with a separate ballot in each party column or row containing only the words 'presidential electors' preceded by the party name, and a vote for such ballot shall operate as a vote for all the candidates for such party for presidential electors, and shall be counted as such."

Therefore it is evident that in placing the names of candidates for office on the voting machine, an exception was made as to the names of presidential electors, and it is, therefore, optional with the authorities having charge of the voting machines as to whether they shall place thereon all the names of the presidential electors or simply the words "presidential electors" preceded by the party name.

The placing of the words "presidential electors" preceded by the party name, on the voting machine, provides a simple method whereby a voter may cast his ballot for all of the candidates nominated by any one party for presidential electors. This arrangement, however, it itself is not complete and does not give to the voter his right and privilege to vote for candidates of more than one party, or to vote for a person not a candidate of any party, and in order to provide the necessary facilities and protect the voter in his rights, the Legislature enacted section 408 of the Election Law applicable to voting machines, paragraph 2 of which provides that "In voting for presidential electors a voter may vote an irregular ticket made up of the names of persons in nomination by different parties, or partially of names of persons so in nomination and partially of names of persons not in nomination, or wholly

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Attorney-General

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of names of persons not in nomination by any party. Such irregular ballot shall be deposited, written or affixed in or upon the receptacle or device provided on the machine for that purpose."

This gives the voter in the election district wherein voting machines are used, an opportunity to vote what is commonly termed a split ticket, by voting an irregular ballot as directed by said section 408 of the Election Law. This irregular ballot may be a paper ballot and deposited in a receptacle attached to and controlled by the machine, in such a manner as to prevent the voter from casting an irregular ballot and at the same time vote a straight ticket for presidential electors.

Section 414 of the Election Law provides that "Whenever irregular ballots have been voted, the inspector shall return all of such ballots in a properly secured sealed package endorsed 'irregular ballots,' and file such package with the original statement of canvass."

Under the sections of the law hereinbefore cited a complete system or method has been provided to vote for candidates for presidential electors without placing the names of the candidates on the voting machine, and the requirements are that the machine shall contain the words "presidential electors preceded by the party name" and be provided with facilities for casting irregular ballots and a receptacle or device in or upon which to deposit, write or affix such irregular ballots. By this method the voter is given an opportunity to cast his vote for each candidate lawfully put in nomination or for whom he may desire to vote and for whom he has the right to vote, and sections 392, 408 and 414 taken together preserve all the rights of the elector to vote for whomsoever he may desire without the necessity of placing in separate spaces on the voting machine the names of all the candidates nominated for that position.

The question has been raised as to whether or not it is legal to vote the general ticket, amendments and questions submitted on the voting machine, and the candidates for presidential electors on a regular paper ballot. The Election Law of the State provides two methods of voting: by paper ballot and by the voting machine.

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Attorney-General

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There is no provision of the statute bearing specifically upon this question, that is, which says you shall or shall not use both methods of voting in an election district, but the requirements of a voting machine as set forth in section 392 of the Election Law, are such as to permit a voter to vote for all candidates, amendments and questions submitted, and in fact, to vote for everything which is contained on the paper ballot. Therefore it is for the authorities to select the method of voting, either by the machine or by paper ballot, and having so selected, they cannot use both methods. If for any reason the voting machine cannot accommodate the whole ticket, then such machine should be discarded and the method of voting by paper ballot should be adopted for such election. The intent of the law is that only one method should be used in an election district, and there are several sections of the Election Law which substantiate this conclusion, namely:

Section 418 specifically states that ballot clerks shall not be elected or appointed for any district for which a voting machine shall have been adopted. It is there evident that if two systems of voting could be used at one polling place, or if it were discretionary with the authorities, there would be no law restricting the appointment of ballot clerks in election districts wherein voting machines are used.

Section 405 prescribes the use of a particular form of tally sheet for the voting machine, differing radically from the tally sheet used in canvassing the paper ballots, and section 413 gives specific directions as to the canvass of the vote and the proclamation of the result in election districts where voting machines are used.

In view of the elimination of ballot clerks, the particular form of tally sheets and the specific directions for the canvass of the vote and the proclamation of the result, and the absence of any legislation tending to supply such districts with material to be used for the voting of a paper ballot, it does not seem logical or reasonable that it was the intent of the framers of the law to permit two methods of voting in the same election district; but on the contrary, all the inferences to be drawn from a close and

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**Attorney-General**

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careful study of the Election Law lead to the conclusion that all the voting in any election district must be performed by one method and it lies with the local authorities to decide which method they shall adopt.

A third question has arisen as to whether or not it is legal to place the name of a candidate more than once upon the voting machine ballot where he has been nominated or indorsed by two or more political parties.

Section 397 of the Election Law, among other things, provides that "When the same person has been nominated for the same office to be filled at an election by more than one party or independent body, all the provisions relating to the official ballot in this chapter shall apply and the voting machine shall be so adjusted that his name shall appear but once on the ballot."

It is, therefore, the intent of the law that the ballot as it appears on the face of the voting machine must be similar to the regular official paper ballot. The difficulty seems to appear where the candidate for Governor is nominated or indorsed by two or more political parties for the reason that the vote for Governor indicates the party strength and a voter has a right to have his party affiliation indicated by his vote for the candidate for Governor. This is accomplished by allotting to the candidate for Governor as many voting levers as there are parties which have nominated or indorsed him as their candidate; for example, if such candidate for Governor is nominated by four political parties, his title of office and name should be written on a space extending under four levers and by each lever there should be placed the emblem of the party so nominating him, and the voter can operate the lever which indicates his party affiliation.

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Attorney-General

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**In the Matter of CONSTRUING THE APPROPRIATION BILL OF 1916,  
in Regard to the Pay of Workmen, Laborers and Mechanics,  
Upon the Canals, for Emergency Work Performed Overtime**

(Opinion dated October 9, 1916)

The eight-hour day provision of the Labor Law, § 3, applies to canal workmen, laborers and mechanics, and they are entitled to extra pay for emergency work done overtime.

Section 2 of Labor Law as to meaning of "employee" as a term also discussed and considered.

Because a laborer is paid a fixed compensation by the month or year, appropriated in that form by the Legislature, does not prevent his being paid extra for overtime emergency work.

*Held*, that the captain, fireman and tughand of the department tug of the Superintendent of Public Works are engaged upon public work for the State and are "hired," and hence are employees within the definition of section 2 of the Labor Law. The employees in question are entitled to extra pay for overtime emergency work.

Attention is also called to the rule laid down in *People v. Interborough Rapid Transit Company*, 169 App. Div. 32, that the simple inquiry is, whether, among the persons enumerated in the submission, there are any who are properly to be classed as mechanics, workmen or laborers, as those terms are ordinarily and naturally used.

Hon. William W. Wotherspoon, State Superintendent of Public Works, submitted an inquiry supplemental to one previously made by him in regard to certain canal employees having a right to be paid for overtime emergency work.

WOODBURY, Attorney-General.—In regard to a letter written you by this department September 15, 1916, in which we expressed the view that workmen, laborers and mechanics upon the canals could be paid for emergency work performed overtime, it has been suggested that since the appropriation bill of this year has segregated all items and has appropriated a particular sum for each employee, the employees have been given positions, with compensation in the nature of a salary, and are therefore no longer laborers, workmen or mechanics to whom the eight-hour day

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 Attorney-General
 

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provision of section 3 of the Labor Law applies. Emergency work overtime would under that view be included in their regular pay or salary, and they could not be allowed any additional compensation for such emergency work. The appropriation bill I have concluded after careful consideration has not effected such a result, and briefly for these reasons:

The appropriation bill of 1916 contains for example the following items in the appropriations for the Superintendent of Public Works:

“Tug Amsterdam:

“Captain, 8 months at \$75.....	\$600 00
“Fireman, 8 months at \$85.....	680 00
“Deckhand, 8 months at \$55.....	440 00”

Section 3 of the Labor Law contains a provision that laborers, workmen or mechanics on all public works shall be paid the prevailing rates of wages in the vicinity. This provision is at once nullified when the Legislature appropriates a particular sum for the compensation of the employee. But although the prevailing rate of wages provision goes down, does not the eight-hour day limitation still survive, or in other words, has not the Legislature appropriated a particular sum for the employee for eight hours' service per day from that employee for the period stated? If such is the proper interpretation of the law, then, of course, the employee is entitled to compensation for overtime emergency work.

I find nothing in section 3 of the Labor Law which commands that the hours of labor provision and the prevailing rate of wages provision must always operate together and cannot operate separately; *i. e.*, there is nothing to indicate that because a laborer is paid a certain fixed compensation by the month or year, appropriated in that form by the Legislature, he is at once withdrawn from the operation of the eight-hour provision and may be compelled to work more than eight hours for that particular sum (which perchance may be less even than the prevailing rate of wages in the vicinity).



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Attorney-General

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Now section 3 (Labor Law) provides: "Eight hours shall constitute a legal day's work for all classes of employees in this state except those engaged in farm and domestic service unless otherwise provided by law. This section does not prevent an agreement for overwork at an increased compensation except upon work by or for the state or a municipal corporation, or by contractors or subcontractors therewith."

"Employee" as defined in section 2, "means a mechanic, workingman or laborer who works for another for hire."

It is assumed without discussion that the captain, fireman and tughand on the department tug of the Superintendent of Public Works, are engaged upon *public work for the state*, and that they are *hired*. "To hire" means (Century Dictionary), "to engage the services of; employ for wages, a salary, or other consideration; as to hire laborers, a clerk, a teacher," etc.

We have no grounds for believing that the eight-hour law was enacted only for laborers, workmen and mechanics working for the state who are *hired by the day*, and was not intended to cover those who were *hired by the month or year*. You can *hire* a man as well for a month or a year as you can for a day, and if a contractor *doing public work* and hiring his workmen by the month or year must still observe the eight-hour law, the state itself when hiring its workmen directly *upon public work* falls within the scope of the same provision. The statute could not be intended to work any distinction in the application of the principle, the factor of "public work" appearing with equal force in both instances.

If we say the eight-hour provision is to apply to workmen hired from day to day at a prevailing rate of wages and not to workmen hired at a certain sum per week, month or year, we overlook the fundamental spirit of the eight-hour movement, and view it as a method of controlling wages and not as the exercise of the right of the state in the control of its own work to declare its belief in the eight-hour day as an economic proposition by forbidding any laborer to work for it more than eight hours in any one period of twenty-four. The statute expresses itself very clearly. It is not a question of wages at all. No matter what

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Attorney-General

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increased compensation might be offered for work in excess of eight hours, such excess work for the state is absolutely forbidden. "Eight hours shall constitute a legal day's work for all classes of employees in this state except those engaged in farm and domestic service unless otherwise provided by law. *This section does not prevent an agreement for overwork at an increased compensation except upon work by or for the state or a municipal corporation, or by contractors or subcontractors therewith.*"

We are justified, I think, in assuming that the Legislature of 1916 in passing the appropriation bill did not when merely fixing the amount of compensation of laborers, workmen and mechanics working directly for the State, intend to cast aside the eight-hour provision so many years a part of our law, leaving it still to apply to a laborer working for a contractor with the State and not to the fellow laborer at his side working directly for the State.

How a man is paid, whether at so much per day, at so much per month or so much per year, does have weight when taken in connection with the amount of manual labor he performs in determining whether he is in that class of common service termed "laborers, workmen or mechanics." But granted a man is a laborer, workman or mechanic because he actually engages in manual labor to such an extent that there is no doubt as to his classification as a laborer, could then a change in the amount of his pay or in the time of paying him remove him from that class? We must, I think, always apply the words "laborers, workmen or mechanics" as used in section 3 of the Labor Law in the sense they are ordinarily and commonly used in daily affairs. In such view the captain, fireman and tughand were laborers, workmen or mechanics prior to the appropriation bill of 1916 and still are. The eight-hour day applies to them, and for emergency service overtime they are entitled to receive additional compensation.

I am quite aware of certain decisions in the Appellate Division which present apparent obstacles to the conclusion above reached. In *Farrell v. Board of Education*, 113 App. Div. 405, the position of janitor in a public school in the Borough of Brooklyn was

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Attorney-General

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held not to be within the prevailing rate of wages provision of section 3 of the Labor Law. The court proceeds on the argument that the janitor was paid a "salary", \$1,700 per year, and was "appointed" by the school board. Discussing section 3 of the Labor Law, the court remarks: "Of course, as in discharge of such duties, he labors and works and employs mechanical skill, he may be said, as the doer, to be, in the broad sense of the terms, a laborer, a workman or a mechanic, for the first two words are generic, and sometimes, all other signs failing, have been regarded even as marking those who toil from those who are idle. But the language of the Labor Law (*supra*) indicates that it refers to those who are paid daily wages for labor upon public works, and that its purpose is to require that such wages shall equal the prevailing rate paid to other laborers, workmen or mechanics not engaged upon public works. \* \* \* In *State ex rel. Ives v. Martindale* (47 Kan. 147) a somewhat similar statute was under review and the court held that a like expression did not embrace any officer or employee for whom an annual salary had been specifically named and appropriated by the Legislature. I think the principle is the same, notwithstanding the action in this case is by the local authorities, inasmuch as it is pursuant to the express sanction of the Legislature."

To the same effect is the holding in *Bock v. City of New York*, 31 Misc. Rep. 55, where a painter sued the city for the difference between the compensation he actually received from the city and the prevailing rate in the vicinity which he claimed should have been paid him. The court held that the painter was an appointee of the city at a fixed salary and was not entitled to any prevailing rate of wages.

Both the above cases are authority for the proposition that a man holding a yearly employment at a fixed salary is not within the intent of the prevailing rate of wages provision because he does not come into competition with other workmen of his class seeking daily or weekly employment. He has given up his right to earn the prevailing rate at days' wages in exchange for permanent employment which assures the income.

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Attorney-General

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There is no quarrel with the above decisions. They are not authority against my conclusion, involving as they do *only* the prevailing rate of wages provision of section 3 and not the eight-hour provision.

People ex rel. Sweeney v. Sturgis, 78 App. Div. 460, does take up the eight-hour provision of section 3 and declares it not to be applicable to a uniformed member of the fire department of the city of New York: "It is obvious that the Legislature did not intend to include the uniformed members of the fire department within the act when in the definition of the 2d section it limited its application to a mechanic, workingman or laborer 'who works for another for hire.' The word 'hire' evidently does not relate to public officers or others holding positions under the city, who are included in the classified lists of the Civil Service Law, such as the uniformed members of the fire department who are appointed to position after rigid examination and from competitive lists. No contract of hiring is made with them. They receive annual salaries, not wages, neither in the common or legal acceptance of the term. Under section 737 of the charter they receive a 'warrant of appointment signed by the fire commissioner.' Under section 738 they take an oath of office. Under section 736 they are also exempt from jury duty and from arrest on civil process and while on duty from service of subpoenas from civil courts. Under other sections they are graded in rank, receive salaries according to such rank and become entitled to pensions under certain conditions. These rights and privileges clearly differentiate them from laborers working for hire."

The result arrived at in the above case was undoubtedly correct but might have been reached on the single broad ground that "firemen" just the same as policemen are not *ordinarily* regarded by the public as laborers, workmen or mechanics.

This rule for interpretation is the safer one and is the one employed by the court more recently, in the case of People v. Interborough Rapid Transit Co., 169 App. Div. 32, wherein construing section 2 of the Labor Law which defines "employee" to mean "a mechanic, workingman or laborer who works for another for hire," the court said: "Each statute must necessarily be

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Attorney-General

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largely a law unto itself, and its proper interpretation must depend upon its own particular language. The statutory definition, which we have here to guide us, prevents any peculiar force being attached to the terms 'wages' and 'employee', *and confines us to the simple inquiry whether, among the persons enumerated in the submission, there are any who are properly to be classed as mechanics, workmen or laborers, as those terms are ordinarily and naturally used."*

In the Interborough case a stenographer, accountant, typist, chainman, levelman, civil engineer, bookkeeper, draftsman, structural designer, a clerk and a rodman were held not to be laborers, workmen or mechanics. A blue-printer, office boy, matron, telephone switchboard operator and a chauffeur were held to fall within the class of laborers, workmen or mechanics. The conclusions were reached by the court as to the latter positions despite the fact that the individuals were paid by the month or year — which is the application of the point I have attempted to make in this memorandum, namely, that the fact that the Legislature appropriated a certain amount per month or year for the captain, fireman and tughand of the Superintendent's boat, does not have any bearing upon whether those men are laborers, workmen or mechanics. *The nature of their duties* is the only test.

There is one further observation. The Legislature did not in my opinion by drafting the appropriation bill in its present form purpose to create offices or positions with salary attached for every laborer, workman or mechanic employed by the State. The form of the bill was designed merely to disclose the moneys which were being paid to officers and employees. If positions with salaries have been created, every appropriation (and there are many of them in the appropriation bill) for "laborer, common, 313 days at \$2.00 . . . . \$626.00" creates a position with annual salary attached, and takes the common laborer, along with every other employee of the State, out of the operation of the eight-hour day provision.

It is my best judgment that the captain, fireman and tughand referred to in the letter of the Superintendent of Public Works are notwithstanding the form of the appropriation bill of 1916, still

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**Attorney-General**

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workmen, laborers and mechanics entitled to an eight-hour day, and for services in emergencies beyond eight hours are entitled to additional compensation, which is available in the fund appropriated for "unforeseen necessities" under the heading "repairs" at page 370 of the appropriation bill.

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**In the Matter of Construing the Provisions of CHAPTER 438 OF  
THE LAWS OF 1916, as to Pensions for War Veterans of the  
Civil War**

(Opinion dated October 9, 1916)

A veteran of the Civil War, granted a pension by the State under said statute, must also be allowed reasonable compensation for his board and lodging where, under his said employment, he was entitled to them as a part of his compensation.

Soldiers, sailors and marines of the Civil War, entitled to a pension under the provisions of chapter 438, Laws of 1916, who were serving the State under employment or appointment by the State Hospital Commission, in any capacity in which they were entitled to maintenance in addition to a stated salary at the time of their retirement, are permitted to have the fair value of such maintenance added to their stated salary for the purpose of fixing the amount of their pensions.

Hon. Eugene M. Travis, State Comptroller, submitted an inquiry as follows: How shall the amount of a pension to be paid to a retired veteran of the Civil War be ascertained in those cases where such veteran was employed by the State at the time of his retirement at a stated salary, and in addition thereto was entitled to maintenance from the state?

WOODBURY, Attorney-General.— By chapter 438 of the Laws of 1916, a new section numbered 21-a was added to the Civil Service Law, which reads as follows:

"§ 21-a. Retiring veterans of the late civil war and granting them pensions. Every soldier, sailor or marine of the army or navy of the United States in the late civil war, honorably discharged from service, who shall have been employed for a continuous period of ten years or more in the civil service of the state of New York, and who shall have reached the age of seventy years,

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Attorney-General

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upon his own request, or if employed in manual labor, upon becoming incapacitated for performing manual labor, shall be retired from his employment by the state of New York, and thereafter and during his life, the state department or institution which employed him at the time of his retirement, shall pay to him, in the same manner that the salary or wages of his former position were customarily paid to him, an annual sum equal in amount to one-half of the salary or wages paid to him in the last year of his employment; provided, however, that the amount so to be paid to such retired veteran shall not exceed the sum of one thousand dollars per annum."

It is provided by section 49 of the Insanity Law that the State Hospital Commission with the approval in writing of the Governor, Secretary of State and Comptroller, shall fix the annual salaries of the resident officers of the State hospitals and that "Food supplies shall be allowed to officers and employees and the families of the superintendent, first assistant physicians, directors of clinical psychiatry, pathologists and steward. \* \* \* Such families shall consist only of the wives and minor children of such officers. No other persons, except those regularly employed, shall be allowed rooms and maintenance, except at a rate to be fixed by the commission; such supplies shall be drawn from the supplies provided for general hospital use. With the approval of the commission, officers or employees of state hospitals may be permitted to live outside of such hospitals, and shall receive such sums in lieu of the quarters or supplies furnished by the hospitals as may be equitable."

It is further provided by section 50 of the Insanity Law, in part as follows: "\* \* \* When employees are allowed to board and lodge away from the hospital on account of lack of accommodations in the institution a uniform rate of not less than sixteen dollars per month shall be allowed in addition to the regular monthly wages, and this amount shall be apportioned at the rate of four dollars per month for each meal and four dollars per month for lodging."

It seems clear from a perusal of the above statutes that the

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Attorney-General

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Legislature intended that certain officers and employees at the State hospitals should be allowed their maintenance in addition to the salaries fixed by the State Hospital Commission, and by the above quotation from section 50, the amount to be paid by the State for such lodging and maintenance was fixed at the minimum rate of sixteen dollars per month in addition to the regular monthly wages, in all cases where the employees who were entitled to maintenance boarded and lodged away from the hospital. It is fair to assume that the Hospital Commission fixed the salaries and wages of such officers and employees that were entitled to board and lodging with due regard to the value thereof, and it is also fair to assume that the wages and salaries of such employees who were entitled to such accommodations, were fixed at a less sum than they might or otherwise would have been fixed at if they had not been entitled to the same. It would be inequitable and unfair to all such employees to deny consideration or allowance of their board and lodging in fixing the amount of their pensions. It is a part of their compensation for services rendered to the State. They would not be entitled to either except for services rendered.

Bouvier defines "wages" as follows: "Compensation given to a hired person for his or her services."

"Salary," "A reward or recompense for services performed."

"Under a contract the employee may be entitled, as his compensation or as a part thereof, to food, clothing and lodging." 26 Cyc. 1050.

If the amount paid by the State to an employee for meals and lodging was so paid as a part of his compensation for services rendered the State, and I think it must be so considered and treated, then, any allowance made in lieu of such board and lodging, when the employee boarded and lodged away from the hospital, or the fair value of his board and lodging when he had it at the institution, must be regarded as a part of his wages or salary and should be taken into consideration in fixing the amount of his pension just as much as though such employee had been paid that amount more in cash.

I do therefore advise you that in fixing the pensions of retired veterans of the late Civil War pursuant to the provisions of chap-



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Attorney-General

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ter 438 of the Laws of 1916, due allowance should be made for the amount and value of the board and lodging of all those employees who were entitled to such board and lodging in addition to the money, salary or wages paid them. As a basis for ascertaining the amount of such pension, there should be added to the regular cash salary or wages of each employee for the last year of his service, the amount which has been allowed him, if anything, for board or lodging outside of the institution, as provided by section 50 of the Insanity Law, not less, however, than at the rate of sixteen dollars per month. One-half of the aggregate of such items would fix the amount of such pensions. As to those employees who have been having board and lodging upon the grounds, there should be added to their regular cash salary or wages, an amount equal to that allowed to employees of the same grade who have been receiving board and lodging away from the institution; not less, however, than at the rate of sixteen dollars per month, and the pension fixed at one-half of the aggregate of the two items. If any cases should arise where no employee of equal grade has been receiving any sum for board or lodging outside of the institution, which could be used as a basis for the ascertainment of the value for inside accommodation, then the amount should be fixed at the fair value of such inside accommodation but not less than at the rate of sixteen dollars per month.

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**In the Matter of Construing the HIGHWAY LAW in Regard to the Acquisition by a Board of Supervisors of Interest in Lands Less than the Fee**

(Opinion dated October 19, 1916)

**Acquisition of easement in lands for deposit of spoil.**

A board of supervisors of a county, in acquiring lands pursuant to sections 148-155 of the Highway Law (Laws of 1909, chap. 30, as amended), may acquire an easement in lands to be put to the use of spoil area.

Hon. Edwin Duffey, State Commissioner of Highways, submitted an inquiry as to whether under the existing statutes an

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Attorney-General

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easement for spoil purposes can be acquired during the period of the construction of State highway No. 5498 in the property upon which the stones and other debris is precipitated, the facts in the premises being as follows:

WOODBURY, Attorney-General.—State highway No. 5498, Orange county, extends along the easterly and southerly sides of Storm King Mountain and is commonly known as the Storm King road. The major portion of this highway is over new rights of way, land sufficient for the location of the highway having been acquired on Storm King Mountain over certain private property. At points along the newly acquired right of way the slope of the mountain is steep. At these points the roadway is to be cut out of the solid rock. To progress the work within reasonable expense blasting operations are necessary. Owing to the character of the rock as well as the precipitous slope of the mountain it is impossible to carry on the work incidental to this construction without causing loose stone to break away and be precipitated down the mountain side upon private property.

By sections 148–155 of the Highway Law (Laws of 1905, chap. 30, as amended the Legislature has prescribed a method of taking private property for a public use, viz.: for the construction of State or county highways and uses in connection with such construction.

Section 148 provides as follows: "*Acquisition of lands for right of way and other purposes.*—If a state or county highway, proposed to be constructed or improved as provided in this article, shall deviate from the line of a highway already existing, the board of supervisors of the county where such highway is located, shall acquire land for the requisite right of way prior to the actual commencement of the work of construction. The board of supervisors may also acquire lands for the purpose of obtaining gravel, stone or other material, when required for the construction, improvement or maintenance of highways or for spoil banks together with a right of way to such spoil banks and to any bed, pit, quarry, or other place where such gravel, stone or other material may be located."

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Attorney-General

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Referring to the provisions of the section quoted above "the board of supervisors may also acquire lands for \* \* \* spoil banks, together with a right of way to such spoil banks \* \* \*" it will be noted that the statute does not provide in particular terms for the acquisition of the fee to the land.

The courts have repeatedly held that in the taking of private property for public use the statutes conferring that power are to be strictly construed and where the estate to be taken is not defined, only such an estate or interest will vest as is necessary to accomplish the purpose in view, and where an easement is sufficient no greater estate can be taken.

In *Hudson & Manhattan R. R. Co. v. Wendel*, 193 N. Y. 166, 176, Judge Chase writing for the Court of Appeals, quoting from authorities cited upon this question states as follows: "In the absence of constitutional restrictions the legislature in the exercise of its power to authorize the taking of private property for public use is the exclusive judge of the extent, degree and equality of interest which are proper to be taken. It rests wholly in the wisdom of the legislature to say what estate shall be taken. In construing the statutes however it will not be implied that a greater interest or estate can be taken than is absolutely necessary to satisfy its language and object or than the constitution allows. And although a taking of the fee may be authorized where necessary in the absence of express words the statute will not be so construed where its purpose will be satisfied by the taking of an easement. \* \* \* In construing a statute authorizing the taking of private property for public use, it will not be implied that a greater interest or estate can be taken than is absolutely necessary to satisfy the language and object of the act, and where the constitution and statute are both silent on the subject nothing more than an easement can be taken." See also *Brooklyn Park Commissioners v. Armstrong*, 45 N. Y. 234, 240; *Washington Cemetery v. Prospect Park & Coney Island R. R. Co.*, 68 id. 591, 594; *Sweet v. Buffalo, N. Y. & Phil. Ry. Co.*, 79 id. 293, 299.

From the inquiry by the Commissioner of Highways it is apparent that the acquisition of an interest in extra land is desired to provide for spoil area upon which the contractor will be per-

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Attorney-General

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mitted to deposit spoil during actual construction work. It is my opinion that such a use of land is within the provisions of section 148 of the Highway Law quoted above and to borrow from the language of Judge Chase in *Hudson & Manhattan R. R. Co. v. Wendel*, *supra*: "although a taking of the fee may be authorized where necessary in the absence of express words, the statute will not be so construed where its purpose will be satisfied by the taking of an easement."

I am, therefore, of the opinion that under the statutes the board of supervisors of Orange county are authorized to proceed to acquire an easement in lands adjoining the right of way acquired for the construction of State highway No. 5498 for the purpose of depositing thereupon spoil resulting from such construction.

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IN THE MATTER OF CONSTRUING SUBDIVISION 11 OF SECTION 38 OF  
THE COUNTY LAW AND SECTION 48 OF THE TOWN LAW, RELATIVE  
TO VOTING AT SPECIAL ELECTIONS IN FIRE DISTRICTS

(Opinion dated November 22, 1916)

Notice of at least ten days to be posted in four public places — notice to contain the proposition to be voted upon.

The only persons entitled to vote at a special election called for the purpose of annexing territory to the fire district, as provided in subdivision 11 of section 38 of the County Law, are such persons as reside in the original fire district. Persons residing in the territory sought to be annexed are mere petitioners to the original fire district, and are not entitled to participate in such special election.

Mr. William A. McCahill, secretary of the board of fire commissioners, under date of October 28 and November 17, 1916, submitted an inquiry as to who are entitled to vote at a special election called for the purpose of annexing territory to a fire district pursuant to subdivision 11 of section 38 of the County Law.

WOODBURY, Attorney-General.— As to who are entitled to vote at a special election called for the purpose of annexing territory

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Attorney-General

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to a fire district, pursuant to subdivision 11 of section 38 of the County Law, only qualified voters residing in the original fire district are entitled to vote. Those residing in the territory to be annexed are mere petitioners submitting their requests to the original fire district and can in no way participate in such special election.

In the absence of any direct method of procedure for such special election, in subdivision 11 of section 38 of the County Law, I would deem it advisable to follow the procedure set forth in section 48 of the Town Law relative to notice of proposition to be determined by ballot, which states that there shall be given a notice of at least ten days, posted conspicuously in at least four public places, which said notice shall contain the proposition or question to be voted upon. In other words, the fire commissioners should follow the same procedure for the fire district election as is provided for the town clerk under section 48 of the Town Law. It is not mandatory that the polls be open from sunrise to sunset, but that they should be open a sufficient length of time to enable all parties who desire to participate in such election to have ample time in which to cast their vote, and the officers presiding may be the commissioners of the fire district or such persons as may be appointed at the opening of the polls, and such election officers should take the constitutional oath of office before entering upon their duties.

# COMPTROLLER

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## In the Matter of the Provisions RELATING TO JUSTICES OF THE PEACE

(Dated February 11, 1916)

### **Town charges—including meals for travelers—fees of constables.**

No statute permits a justice of the peace to charge a town for meals for persons traveling through the county. The procedure relative to the relief of poor persons is prescribed by the Poor Law.

Constables are not entitled to a fee for attendance upon a court, except in courts of record.

Platt R. Hubbs, Central Islip, N. Y., submitted a statement of facts and inquiries based thereon as follows:

“(1) May a justice of the peace lawfully charge a town for lodging and meals furnished to a person traveling about the county looking for work provided the person has no means of support?

“(2) May a constable lawfully charge a town for attending Justice's Court where he has a prisoner to bring before the justice?”

TRAVIS, Comptroller.—The first question is too absurd to require a legal opinion. The Poor Law provides for the election or appointment in each town of this State of an overseer or overseers of the poor. They are charged with the duty of furnishing relief to all poor persons within the town. The procedure to be followed is outlined in the Poor Law. The town cannot be obligated for the support of a poor person except in the manner stated in the Poor Law and then only after an investigation has been made by the overseer of the poor. If a justice of the peace is permitted to furnish meals and lodgings and charge the town therefor, any other town officer could with equal propriety do so, or in fact, any resident of the town who furnished meals or lodgings to tramps or vagrants would be entitled to charge the expense

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or reasonable cost to the town. Such a proposition is ridiculous. Question number 1 must, therefore, be answered in the negative.

The second question has been answered by the courts of this State. In *Matter of the Town of Hempstead*, 36 App. Div. the following is found: "So far as the items for attendance upon court when jury was summoned, at the rate of fifty cents for each attendance, are concerned, no authority exists in law for such charge. The provision of the statute is that the constable is entitled to charge fifty cents for taking charge of the jury during their deliberation, *but there is no provision of law authorizing a constable to make any charge for attendance upon a court, except when he attends a court of record.*"

The statute has not been changed in this respect since the Hempstead decision was rendered.

I, therefore, conclude that a constable may not lawfully charge his town for attendance upon justice's court.

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In the Matter of the Provisions of the GENERAL MUNICIPAL LAW,  
SECTION 6

(Dated February 23, 1916)

Highway bonds — disposition of surplus.

A surplus arising from the sale of bonds may legally be used only for the purpose for which the bonds were issued.

F. H. Pierce, Dolgeville, N. Y., submitted a statement of facts and an inquiry based thereon as follows:

"In November, 1915, the town of Manheim raised by bond issue \$21,000 to pay the town's share of the cost of building eleven miles of county roads in said town. When the bids for said roads were opened, it required only \$15,000 to liquidate Manheim's share of the cost of construction.

"What may the surplus, \$6,000, be used for?"

TRAVIS, Comptroller.— It is my opinion that the surplus may be used only for the purpose for which the bonds were issued or

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applied in payment of the indebtedness created therefor. Section 6 of the General Municipal Law contemplates that each bond issue shall be devoted to a specific object. The language of that section, in so far as it is pertinent, is as follows: "A funded debt shall not be contracted by a municipal corporation, *except for a specific object*, expressly stated in the ordinance or resolution proposing it." To separate any part of the proceeds of the sale and apply them to another purpose would be illegal and unauthorized.

Should this surplus of \$6,000 be applied in reduction of taxation for current expenses, it would have the effect of bonding the town to pay the cost of current operations. This would violate the spirit and intent of the law.

The general plan of financing towns assumes that there will be levied against the taxable property of the town annually the sums necessary to pay all current expenses. An effort should be made to purchase at par bonds of this issue to the extent of the surplus, thereby retiring them and reducing the town's indebtedness. If that can not be done, it is my opinion that a separate fund should be established in the depository of town funds and an agreement made as to a rate of interest to be paid thereon and the amount of the fund used only in payment of principal and interest of the bonds issued to pay the cost of this improvement.

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In the Matter of the Provisions of the EDUCATION LAW, SECTION 363; PUBLIC OFFICERS LAW, SECTION 11

(Dated February 28, 1916)

**Supervisor's bond — penalty — justification of sureties.**

Before receiving any part of the school money apportioned to a town the supervisor is required to execute and deliver to the county treasurer his bond in the penal sum of at least double the amount set apart or apportioned to the town and of any such moneys unaccounted for by his predecessors.

Sureties are required to justify in the aggregate in at least double the amount specified in the undertaking.



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Comptroller

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Hon. B. S. Hayes, county treasurer, Watertown, N. Y., submitted a statement of facts and an inquiry based thereon as follows:

"If the amount to be paid to a supervisor of a town by the county treasurer of school funds apportioned or contributed by the state of New York is \$2,000, what should be the penal sum mentioned in the undertaking and in what sum should the sureties thereon justify?"

TRAVIS, Comptroller.—Section 363 of the Education Law, in so far as it is applicable to this subject, reads as follows: "The county treasurer shall require of each supervisor, and each supervisor shall give to the treasurer, in behalf of the town, his bond with two or more sufficient sureties, approved by the treasurer, in the penalty of at least double the amount of the school moneys set apart or apportioned to the town, and of any such moneys unaccounted for by his predecessor, conditioned for the faithful disbursement, safe keeping and accounting for such moneys and of all other moneys that may come into his hands from any other source."

Section 11 of the Public Officers' Law reads, in part, as follows: "Every official undertaking shall be executed and duly acknowledged by at least two sureties, each of whom shall add thereto his affidavit that he is a freeholder and householder within the state, stating his occupation and residence and the street number of his residence and place of business, if in a city, and the sum which he is worth over and above his just debts and liabilities and property exempt from execution. *The aggregate of the sums so stated in such affidavits must be at least double the amount specified in the undertaking.*"

I, therefore, conclude that in a town where the amount to be paid to a supervisor is \$2,000 and that constitutes the entire sum received or to be received by him for school purposes during the year, the supervisor should give an undertaking in the penal sum of \$4,000, and that the aggregate of the sums stated by the several sureties in their affidavits shall be at least \$8,000.

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## In the Matter of the Provisions of LAW AS TO INDIGENT PERSONS

(Dated February 28, 1916)

**Quarantine expenses — district chargeable.**

Where a person or family, not paupers, are quarantined because of a contagious disease, and, because of the quarantine, become unable to maintain themselves, the expense thereof is chargeable to the health district. If, however, at the time of imposition of quarantine, the persons were paupers receiving relief from the poor authorities the jurisdiction of the poor officials continues and the expense of maintenance is a charge against the locality chargeable with the paupers' support.

Franklin C. Gilbert, town clerk, Hempstead, N. Y., submitted a statement of facts and an inquiry based thereon as follows:

"At a meeting of the town board of health of the town of Hempstead, N. Y., held Monday, February 21, 1916, I was directed to request an opinion from your office in regards to relief authorized by a health officer in indigent cases of contagious disease, it being the desire of our board to know whether expense incurred through order of the health officer for services rendered by various physicians in such cases are charges against the general fund of the town or against the overseers of the poor."

TRAVIS, Comptroller.— This subject has been considered by the Honorable Attorney-General of the State.

In an opinion rendered on December 12, 1913, he held that where a person or family quarantined by the board of health was not before the quarantine receiving relief from the poor authorities of the municipality, then and in that case the relief furnished and made necessary by reason of the quarantine is a charge against the public health fund and is to be paid by the health district upon which the health fund is levied and assessed.

In another opinion rendered on February 14, 1913, he held that relief furnished to a family or person who, at the time of the quarantine, was receiving relief from the poor authorities of the municipality, should continue during the quarantine to be a charge

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against the poor district properly chargeable with the support of the family or person quarantined.

This distinction was recognized by Mr. Justice Sawyer in an opinion rendered in *Matter of the Application of Lester W. Bel lows and Others v. Board of Supervisors of Seneca County*. In that proceeding it appeared that the family quarantined had never been public charges, that they became so solely by reason of the quarantine. It was conceded that if this family were poor persons under the Poor Law, the expense of their relief would be chargeable against Seneca county. However, the learned justice held that they were not poor persons and that the expense incurred by the board of health for medical services and other relief afforded during the period of the quarantine was a charge against the board of health of the town of Waterloo.

I, therefore, conclude that if at the time the quarantine is imposed the person quarantined is a poor person, then all expenses necessarily incurred for his or her relief and maintenance during the period of the quarantine is a charge against the poor district otherwise chargeable with his or her support; but, if the person quarantined is not at the time of the imposition of the quarantine a poor person within the meaning of that term as defined in the Poor Law, then and in that case all such expenses are chargeable against the health district in which the person is relieved.

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In the Matter of the Provisions of the CODE OF CRIMINAL PROCEDURE, SECTIONS 147, 192, 557, 586 and 589

(Dated March 6, 1916)

**Deposit of cash in lieu of bail — a justice of the peace sitting as a magistrate.**

A justice of the peace, sitting as a committing magistrate, is authorized to accept a deposit of cash instead of an undertaking in cases in which he is authorized to admit to bail.

Cash deposited with a magistrate in lieu of bail should be paid into the office of the county treasurer.

A statement of facts together with inquiries based thereon was submitted as follows:

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"A defendant in a certain town, having been held to answer to the grand jury upon a charge of violation of section 897 of the Penal Law, deposited with the justice of the peace before whom he was arraigned \$100 in cash in lieu of bail or an undertaking for his appearance before the grand jury on said charge. The various papers used in connection with the proceeding were deposited and statements forwarded to the county clerk pursuant to section 221 of the Code of Criminal Procedure but the cash deposit made by the defendant and accepted by the justice was not included in the return and the justice is undecided as to who should receive and have the custody of the cash deposited by the defendant in lieu of an undertaking pending the presentation of the case to the grand jury.

"Did the justice of the peace have the authority to receive the said deposit in lieu of an undertaking, and if so with whom should the said deposit be made pending the determination of the case?"

TRAVIS, Comptroller.—Section 147 of the Code of Criminal Procedure defines or enumerates persons who are designated as magistrates and in this classification we find justices of the peace enumerated. It would therefor appear that a justice of the peace is a magistrate within the meaning of the Criminal Code and, in section 586, the term "magistrate" may be construed as meaning a justice of the peace in certain instances.

Under section 192 of the Code of Criminal Procedure a committing magistrate has power pending the examination concerning a bailable crime or on an adjournment of such examination, to admit the accused to bail irrespective of whether or not the crime is punishable by imprisonment exceeding five years.

Section 557 of the Code of Criminal Procedure, which prohibits a committing magistrate from admitting to bail where the crime charged is punishable by imprisonment exceeding five years, relates only to the admission to bail of a prisoner after he has been held to answer to the grand jury. In this instance it is assumed that the penalty prescribed for the alleged offense would not be greater than imprisonment exceeding five years. The

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authority of the committing magistrate therefor, to accept bail or cash in lieu thereof, appears to be beyond question, as power to hear and determine implies power to admit to bail.

The recent amendment to section 586 of the Criminal Code whereby the scope is widened, was evidently for the purpose of drawing a greater safeguard about the accused than the section in its original form afforded. Prior to the amendment to this section a deposit of cash in lieu of bail was required to be made to the county treasurer and no further provision for a deposit of cash in lieu of bail was made. There can be no distinction drawn between the acceptance of an undertaking and a cash deposit in lieu thereof as both processes are in the nature of a contract with the county whereby in the event that the accused fails to appear, the cash is forfeited or an action accrues on the undertaking.

The cash having therefore been legally accepted by the justice, the second query now presents itself as to the disposition to be made thereof. The second paragraph of section 586 read as follows: "when any such deposit is so made the justice, magistrate or other person with whom it is deposited shall deposit the sum so received by him in the same manner as may be by law provided for the payment and deposit of money with the clerk of such court." The course to be pursued therefore, by the justice with relation to the custody of the cash deposited in lieu of bail should be identical to that practiced by the clerk of the court when the deposit is made in such court. It is a well established practice that an order is entered providing for the deposit of funds of this character with the county treasurer pending final determination. Sections 588 and 589 indicate beyond any question that the custody of the fund should be with the county treasurer as section 588 provides that in the event that bail is to be substituted for a cash deposit, the court or magistrate before whom the bail is taken must thereupon direct that the money deposited be refunded by the county treasurer to the defendant. Again in section 589, where a deposit has been made and the same is applied to the payment of judgment or fine, the surplus, if any, shall be returned by the county treasurer under the direction of the court.

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Comptroller

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While section 586 does not specifically state that the moneys so deposited with the justice shall be paid or deposited with the county treasurer, yet the only inference that can be drawn from a careful reading of this section, together with sections 588 and 589, leads to the conclusion that the justice of the peace acted within the scope of his authority in accepting \$100 cash in lieu of an undertaking and that the depository of the funds should be the office of the county treasurer subject to the further order of the court having competent jurisdiction.

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In the Matter of the Provisions of the CHARTER OF THE VILLAGE  
OF WHITE PLAINS (Laws of 1915, chap. 356)

(Dated March 13, 1916)

Sections 60, 64, 65 and 219 relative to municipal budget — transfers — appropriations for contingencies.

A municipal budget is the formal, complete, final statement of the proposed financial plan for a fiscal period comprising the authorized municipal expenditures for that period correlated with the estimated revenues and other means of meeting such expenditures.

An appropriation once made is fixed and determined and, in the absence of special authorization, may not be transferred to any other appropriation or used for any other purpose.

Eben H. P. Squire, Corporation Counsel, White Plains, N. Y., submitted a statement of facts and inquiries based thereon as follows:

"The common council of the city of White Plains adopted on January 31, 1916, a budget for the city of White Plains for the year 1916. The appropriations were set forth in two columns, one headed 'schedule' and the other headed 'appropriations.' In the schedule column were shown the amounts allowed for each of several classes of expenses pursuant to a uniform expense classification prescribed by the state comptroller and adopted by the council. The total allowed for each office or bureau was entered in the appropriation column.

"Section 2 of the budget ordinance provides as follows: 'The several sums entered in the column marked appropriation are

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hereby appropriated for the several departments, boards, offices and purposes specified herein excepting the items for contingencies mentioned in section 3 of this ordinance. Each department, board or officer shall limit its or his expenditure for the various purposes set forth in the budget to the amounts appearing in the column marked schedule unless the common council shall expressly authorize a transfer from one schedule to another within an appropriation. The positions designated herein are hereby established.'

"The budget contained a number of appropriations for 'contingencies.' Section 3 of the ordinance provides with respect to these that they 'are hereby declared to be appropriated for the departments, boards and offices named but subject to the reappropriation of the common council. The common council may hereafter use these appropriations for the purpose of transferring the amounts therein to supplement or create other appropriations for the boards, departments or offices specified. No part of the funds contained in these appropriations shall be used for the payment, expenditure or incurring of indebtedness until after such transfer or reappropriation by the common council.'

"The opinion of the department is asked on several questions all having to do with determining in what respects, if any, the common council may supplement or add to the appropriations now found to be deficient. These inquiries resolve themselves into separate questions as follows:

"(1) May the common council transfer an appropriation made for one bureau or office to another bureau or office?

"(2) May an item in the budget intended to be for alteration and repairs to the municipal building which was by error included in the appropriations for the commissioner of public safety, who chiefly occupies the municipal building, be transferred to the appropriation for municipal building?

"(3) May an appropriation for contingencies classified under the fire bureau be transferred by dividing it between the fire bureau and the police bureau?"

TRAVIS, Comptroller.—In order that this opinion may be a guide in solving all similar problems that may arise in the city

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Comptroller

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of White Plains, I think it advisable to discuss briefly the principles of budgets for cities, particularly in reference to a city having a charter such as that of White Plains. A budget has been defined as follows: "A municipal budget is the formal, complete, final statement of the proposed financial plan for a fiscal period comprising the authorized municipal expenditures for that period correlated with the estimated revenues and other means of meeting such expenditures."

A municipal budget is intended, and should be used, as an instrument of financial control. The various appropriations for expenditures are in the nature of allowances to be expended by the officers of the city for the several purposes named in the municipal budget. Through the municipal budget, the people and their direct representatives should control, regulate and direct municipal expenditures with the aim of making the administration of governmental affairs efficient and economical.

At the time the budget was considered by the council, a public hearing was had, the estimates had been published and the taxpayers and other citizens heard on the subject. It is obvious that a budget cannot serve its purpose, if after its adoption the common council should make repeated changes therein so that the actual expenditures of the city will bear little resemblance to the budget as originally adopted in the full light of publicity. To do so, would deceive and mislead the taxpayers. If the common council adopts a budget without having before it sufficient information upon which to act intelligently and if the budget as adopted is difficult of administration because of omissions and other defects, I think that as a matter of policy it is better for the city to suffer the consequences that come from a poorly prepared budget rather than that it should undermine and destroy the safeguards that accrue from and which the public generally associates with a budget. As a matter of law, there is very little relief. The charter of the city gives the council no power to transfer part of one appropriation to supplement another, and it forbids in very stringent terms the incurring of any debts or liabilities or the payment of any sums in excess of the appropriations adopted.

Section 60 of the charter provides as follows: "The several



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sums contained in the final estimates of revenues to be received by the city applicable for such purposes and all moneys necessary to be raised by tax, in addition thereto, to pay the expenses of conducting the business of the city, shall be and become appropriated in the amounts and for the several departments, offices and purposes named therein for the following fiscal year."

Section 64 of the charter provides as follows: "It shall not be lawful for any officer, board or department of the city to enter into any contract for work, labor or services \* \* \* which by the terms of such contract involves the expenditure of money or liability therefor which \* \* \* shall be in excess of the amount which has been estimated and allowed for such officer, board or department in the final estimate adopted by the common council."

This section further provides that any contract made in violation thereof shall be null and void, and that any officer making or voting for such contract or auditing any account or claim thereunder, shall be guilty of a misdemeanor.

My answer to inquiry one must, therefore, be that the common council has no such right; that in the absence of any special authorization, an appropriation once made is fixed and determined and may not be transferred to any other appropriation or used for any other purpose.

In this connection, I note that the ordinance adopted by the council considers as appropriations the total amount for each office or bureau and not the items making up the total. It is my opinion that the practice is not a sound one and has the effect of destroying considerably the value of segregated budget. That having been done, however, it is my opinion that the council may make transfers from one schedule item to another within the same appropriation but not from one appropriation to another.

The answer to inquiry two is governed by the answer to inquiry one. This transfer may not be made. If, however, it is the fact that the commissioner of public safety occupies the municipal building and if the repairs are such as come under the jurisdiction of the commissioner of public safety, I see no objection to paying for those repairs out of the appropriation allowed to the commissioner of public safety. Section 117 of the charter

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provides that the commisisoner of public works shall have charge of the repair and maintenance of public buildings. If, therefore, the repairs are such as come under his jurisdiction, they may be paid out of any appropriation allowed to the commissioner of public safety.

In answering the third inquiry, I want it understood that I am not passing upon the propriety or legality of appropriations for contingencies as my opinion is not asked thereon. The common council has made appropriations for contingencies and taxes have been levied to meet them. They must, therefore, be accepted as a fact. Section 3 of the budget ordinance provides that the common council may use the appropriation for contingencies for the purpose of transferring the amounts therein to supplement or create other appropriations for the boards, departments or offices specified. It is my opinion, that pursuant to this reservation, the council may transfer any appropriation for contingencies for a bureau in one department to any other bureau in the same department.

Section 219 of the charter provides that the commissioner of public safety shall have charge of the bureau of fire and police. It is my opinion, therefore, that a contingency appropriation for one of these bureaus may be transferred by the common council for use of another bureau. This disposes, I believe, of all the inquiries made.

I call attention, in addition, to section 65 of the charter, which provides as follows: "When any money or revenues are received by any officers, board or department of the city in any way other than by municipal tax, such money or revenues may, with the approval of the common council, be used and applied toward and in addition to the funds so estimated and allowed by the tax budget in such manner as in the judgment of the said common council may be most beneficial to the city."

I am of the opinion that the only means for increasing any of the appropriations contained in the budget, consists in appropriation of surplus revenues, if there be any, pursuant to the provisions of this section. If any miscellaneous revenues should exceed the amount estimated in the budget, I believe the common council may use the excess to supplement appropriations.

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Comptroller

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In the Matter of the Provisions of the CODE OF CRIMINAL PROCEDURE, SECTION 132 — Torts of Village Police Officers

(Dated March 15, 1916)

**Defense of law suits — proceedings for removal of village officer — services of counsel.**

A village is under no obligation to pay the expenses incurred in defense of an action brought against a police officer to recover for an alleged assault. Expenses incurred by a village officer in resisting removal from office are not a charge against the village.

Herman Dean, Fishkill, N. Y., submitted a statement of facts and an inquiry based thereon as follows:

"An ex-police officer of a village, having been indicted by the grand jury for assault in the second degree, the assault being alleged to have been committed during the term of the officer's service as a village policeman, the village board passed a resolution to furnish counsel for the defense of such ex-officer at the expense of the village.

"Charges having been preferred to the appellate division of the supreme court against a village police justice and an order to show cause why he should not be removed from office having been served upon him, the village board has authorized or promised to authorize the payment by the village of the expenses incurred by such police justice in defending himself before the appellate division.

"(1) May the village board obligate the village to pay the expenses incurred by the ex-police officer in defending the action brought against him?

"(2) May the village board authorize the police magistrate to employ counsel at the expense of the village in defending himself in the proceedings brought for his removal?"

TRAVIS, Comptroller.— In my opinion, both inquiries should be answered in the negative.

If the police officer, as alleged, did assault an intoxicated man,

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he exceeded his authority because it was no part of his duty to strike any person. A similar question was before the court in *Donohue v. Keeshan*, 91 App. Div. 602. Mr. Justice Woodward, in writing the opinion, said: "The duty of a policeman, under proper circumstances, to make an arrest, carries with it the right to use so much of force, and no more, as is reasonably necessary to accomplish the purpose. When the officer goes beyond that point he ceases to act in behalf of the city, and he assumes the responsibility. The allegation of this complaint is that the defendant 'without justification or provocation' assaulted the plaintiff; and unless the corporation counsel shall be authorized by the revised charter to defend policemen who are charged with the commission of torts, there would seem to be no good reason why the defendant should not be called upon to answer for his tort the same as any other person. As was said by the court in the somewhat analogous case of *People ex rel. Underhill v. Skinner* (74 App. Div. 58, 62): 'It would be against public policy to permit individuals to defend purely personal actions at the expense of the community. Men undertake public duties, they discharge the duties of citizenship, subject to the risk of being called upon to defend their conduct in the courts; it is one of the penalties we pay for the protection of society \* \* \*.'"

As regards the removal of the police magistrate by the appellate division, the only provision of law authorizing and directing that any part of the expense may be charged against the village is that found in section 132 of the Code of Criminal Procedure. In so far as it is applicable, it reads as follows: "The appellate division shall have power to order the proofs upon any proceedings hereunder to be taken before a referee to be appointed by such appellate division and to certify the reasonable expenses of such referee, which amount, so certified, is hereby declared to be a charge against the city, town or village within which such justice of the peace, judge or justice \* \* \* exercises the duties of his office."

I am unable to find any provision of law other than the one last above referred to, which expressly makes expenses incurred by police officers and police magistrates, under circumstances such

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as these, a charge against the village. I, therefore, conclude, as did Mr. Justice Woodward, that there is no good reason why these persons should not be called upon to answer for their torts or misdeeds the same as any other citizen.

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In the Matter of the Provisions of the CHARTER OF GLENS FALLS  
(Laws of 1908, chap. 29), SECTIONS 6, 8, 9 and 20

(Dated March 28, 1916)

Provisions of the Home Rule Bill, Laws of 1913, chapter 246 — salaries of city officials.

The provision of the charter of the city of Glens Falls fixing the salary of the chamberlain has not been repealed or superseded by the so-called Home Rule Bill (Laws of 1913, chap. 247).

W. S. Thomas, Glens Falls, N. Y., submitted a statement of facts and an inquiry based thereon as follows:

"The city of Glens Falls was incorporated by chapter 29 of the Laws of 1908. Section 6 thereof provides that the city chamberlain shall be a city officer; section 8, that he shall be an elective officer. His duties are set forth in section 20. Section 9 reads, in part, as follows: 'He (meaning the chamberlain) shall receive an annual salary of twelve hundred dollars.' The charter was amended generally by chapter 550 of the Laws of 1909, but no change was made in section 9.

"May the common council, pursuant to chapter 247 of the Laws of 1913 — the so-called home rule bill — determine to pay the city chamberlain a sum in excess of \$1200 as his annual salary?"

TRAVIS, Comptroller.— Under the home rule bill, each city is granted certain powers in general and specific terms. Generally, each city is empowered to regulate, manage and control its property and local affairs and is granted all the rights, privileges and jurisdiction necessary and proper for carrying such powers into

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execution. The specific grants, so far as pertinent to the inquiry, are to be found in subdivisions 7 and 23 of the act. These subdivisions are as follows:

Subd. 17. To determine and regulate the number, mode of selection, terms of employment, qualifications, powers and duties and *compensation of all employees of the city* and the relations of all officers and employees of the city to each other, to the city and to the inhabitants.

Subd. 23. To exercise all powers necessary and proper for carrying into execution the powers granted to the city.

With reference to subdivision 17, the Attorney-General, in an opinion dated June 5, 1913 (Opinions, 1913, p. 380) has said: "I do not overlook subdivision 17 of section 20. \* \* \* This must be taken simply to refer to ordinary employees as distinguished from officials appointed or elected under the city charter. Certain it is that the Home Rule bill does not intend (and such power would be ineffectual if attempted to be granted) to allow cities to regulate the number, mode of selecting, terms of employment, qualifications, powers, duties and *compensation of aldermen or members of various municipal boards or of other officials, charged under the charter, with the performance of official municipal duties.*"

My conclusion is that the fixing of salaries of officials is not one of the powers conferred generally or specifically by chapter 247 of the Laws of 1913, and that the provision of the Glens Falls charter mentioned above, has not been superseded.

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In the Matter of the Provisions of the CODE OF CRIMINAL PROCEDURE, SECTION 740-b

(Dated April 5, 1916)

Office of constable—jurisdiction of justice.

A constable is not entitled to a fee for keeping in custody a person under arrest until after arraignment and a direction by a justice to retain the person arrested.

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A justice of the peace acquires no jurisdiction over a person arrested until arraignment and until then can make no order respecting his custody.

Willmirth Haff, President, Board of Town Auditors, Islip, N. Y., submitted an inquiry as follows:

"If a constable arrests late at night and brings before justice in morning, can he charge for two days' custody, or if he holds prisoner one, two or three days before bringing him before justice, can he charge for the one, two or three days?"

TRAVIS, Comptroller.—A constable may not legally charge for keeping a person apprehended under warrant until after arraignment before a justice and by direction of the justice.

The fees of a constable are prescribed in section 740-b of the Code of Criminal Procedure, and among others, is the following: "For keeping a prisoner after being brought before the justice, and by his direction in custody, one dollar per day."

In Matter of the Town of Hempstead, 36 App. Div. at page 335, the court said, respecting this subject: "So far as the item for taking prisoner before a justice is concerned, no charge is permitted by the statute. A constable is only authorized to charge for executing a warrant seventy-five cents, and for the custody of the defendant during the pendency of the proceeding, *when he is directed by the justice to retain the person arrested in custody*, one dollar per day. No other charge in this regard is authorized."

Again, in Ackerson v. Supervisors, 166 App. Div. 22, the court said: "A justice of the peace may direct a town constable to take a person charged with crime into custody on the day of the hearing and on any adjourned day until judgment is given, unless the defendant has been admitted to bail, and the constable is entitled to one dollar per diem for keeping the prisoner, as provided in section 740-b of the code of criminal procedure."

A justice of the peace acquires no jurisdiction over the person in custody until arraignment, and until then, the justice can make no order respecting his custody.

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## In the Matter of the VILLAGE LAW, SECTION 129

(Dated April 5, 1916)

**Serial bonds of the village of Harriman.**

Village bonds must become due within twenty years from date of issue, and, unless the whole amount of indebtedness represented thereby is to be paid within five years from their date, they shall be so issued as to provide for the payment of the indebtedness in equal annual installments, the first of which shall be payable not more than five years from their date.

Knight & Bush, civil engineers and surveyors, Monroe, N. Y., submitted a statement of facts and an inquiry based thereon as follows:

"The village of Harriman is about to issue bonds aggregating \$75,000 for the purpose of constructing a municipal village water plant. It seems desirable to issue serial bonds for a period not exceeding thirty years, and arranging the maturities so that nothing but interest would be paid during the first five years, and that thereafter, the principal sum of the issue shall be paid in graduated installments of \$1,500 per annum in the second five-year period; \$2,000 per annum in the third five-year period; \$3,000 per annum in the fourth five-year period; \$4,000 per annum in the fifth five-year period, and \$4,500 per annum in the sixth five-year period, interest, of course, being paid in addition to the above mentioned sums.

"May this plan be legally carried out in fixing and determining the bond maturities?"

TRAVIS, Comptroller.—I am convinced that it cannot. Section 129 of the Village Law, prior to 1915, read, in part, as follows: "Bonds or other obligations of the village shall be signed by the president and attested by the clerk, under the corporate seal. They shall become due within thirty years from the date of issue, and, unless the whole amount of the indebtedness represented thereby is to be paid within five years from their date they shall



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be so issued as to provide for the payment of the indebtedness in annual installments."

In 1915, that part of section 129 quoted above, was amended by chapter 48 of the Laws of that year, to read as follows: " Bonds or other obligations of the village shall be signed by the president and attested by the clerk, under the corporate seal. They shall become due within thirty years from the date of issue, and, unless the whole amount of indebtedness represented thereby is to be paid within five years from their date they shall be so issued as to provide for the payment of the indebtedness in *equal* annual installments the first of which shall be payable not more than five years from their date."

Careful comparison of the two quotations will readily indicate to you that the effect of the amendment of 1915 was to require that bond maturities of this nature should be so fixed as to provide for the payment of the entire issue in "equal" annual installments.

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In the Matter of the Provisions of the CODE OF CRIMINAL PROCEDURE, SECTION 382 as to Audit of Town Accounts

(Dated April 6, 1916)

**Statute of Limitations — authority of auditors.**

A claim against a town for services rendered during a period of twenty-two years is not a mutual, open and current account. The six-year Statute of Limitations applies to accounts against towns, and a board of town auditors has no authority to waive the statute.

A board of town auditors has no authority to allow a claim at a sum greater than the amount claimed. A bill which is not correct may be returned for correction or audited as presented, and claimant may present another claim for such additional amount as may be legally due.

A. L. Downs, Secretary, Board of Town Auditors, Mattituck, N. Y., submitted a statement of facts and inquiries based thereon as follows:

"(1) A claimant presents an account against the town for audit, containing charges for erecting and taking down election

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booths, covering a period of twenty-two years. For how many years should the board of town auditors allow payment of this account?

“(2) In case a claimant, by mistake or through ignorance, presents a claim for audit in which the fees charged are less than the legal fees fixed for the particular services, should the board of town auditors increase such bill allowing the claimant the legal fees prescribed by law?”

TRAVIS, Comptroller.—In answer to inquiry 1, permit me to say that I am of the opinion that the board of town auditors should audit the account, allowing a reasonable sum for services performed within the six years before the presentation of the account.

Section 382 of the Code of Civil Procedure fixes a six year Statute of Limitation for ordinary accounts and contracts. That section is applicable to charges such as are referred to in this inquiry. The claimant's account cannot, in my opinion, be deemed a “mutual, open and current” account. Accounts are “mutual, open and current” when each party makes charges against the other without at any time stating the accounts. *Ross v. Ross*, 6 Hun, 80.

The board of town auditors has not the power to waive the Statute of Limitations. In *Woods v. Supervisors*, 136 N. Y. 403, it was held that the power given to boards of supervisors to audit, settle, pay or compromise claims against their counties, implies power to waive, by proper agreement, the defense of the Statute of Limitations as to claims not already outlawed.

In *McGreevy v. City of New York*, 30 Misc. Rep. 56, it was held that where a claim against a town has become barred by the Statute of Limitations, the town board of the town has no power to revive the claim.

I, therefore, conclude that the board of town auditors of your town is without power to audit and allow items or charges contained in the claimant's account for services rendered more than six years before the presentation of the account.

Answering inquiry 2, permit me to say that the board of town

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auditors has not the authority to allow an account at a sum greater than that claimed by the claimant. It may return the bill for correction, or audit and allow it at the sums charged and permit the claimant to present another claim for the additional sums legally his due.

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In the Matter of the Provisions of the PUBLIC OFFICERS LAW,  
SECTION 62, and of the TOWN LAW, SECTIONS 85 AND 131,  
Relative to Meeting of Town Board

(Dated April 7, 1916)

**Organization of town board—meetings on holidays.**

No statute prohibits a meeting of a town board on a legal holiday. When such a meeting is held the members of the board are entitled to the compensation prescribed by statute.

Charles P. Calhoun, Secretary, Board of Auditors, Harrison, Westchester county, N. Y., submitted a statement of fact and an inquiry based thereon as follows:

“The town board of the town of Harrison, Westchester county, convened on January 1, 1916, for the purpose of organizing and for the transaction of any necessary business.

“Is it legal for the town board to meet on a holiday, and are the members thereof entitled to compensation for their services?”

TRAVIS, Comptroller.—Section 85 of the Town Law, in so far as it is applicable to this question, reads as follows: “Town officers shall be entitled to compensation at the following rates for each day actually and necessarily devoted by them to the service of the town in the duties of their respective offices, when no fee is allowed by law for the service, as follows: The supervisor \* \* \*, town clerk \* \* \*, justice of the peace \* \* \*, each, two dollars per day, unless a different rate be fixed by or pursuant to this section.”

Section 131 of the Town Law reads, in part, as follows: “The supervisor or the town clerk may call a special meeting of the town board at any time by giving at least two days’ notice in person or

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in writing to the other members of such board of the time when and the place where such meeting is to be held."

Section 62 of the Public Officers Law provides, in this connection, as follows: "Holidays and half holidays shall be considered as Sunday for all purposes relating to the transaction of business in the public offices of the state and of each county."

This statute was considered in the case of *Flinn v. Union Surety & Guaranty Company*, 170 N. Y. 145, and interpreted in the following language: "The obvious purpose of this statute was to authorize the closing of the public offices of the state and the counties upon public holidays for the purpose of relieving the officers and employees in such offices from the duty of performing official services on such days. \* \* \* It does not prohibit an officer from voluntarily performing official acts on such days or render such acts void or voidable unless the act is such as to create an unlawful preference under the recording act or is prohibited by some other statute."

The provision of the Public Officers Law, quoted above, refers to public officers of the State or of a county, and does not, by its terms, include towns or other municipal subdivisions of the State. I have found no statute, and have been referred to none, authorizing or directing the closing of town offices on legal holidays, nor any inhibition against a per diem officer from receiving compensation for services actually and necessarily performed for or on behalf of his municipality on a holiday.

However that may be, if the Public Officers Law provision is held to include public officers of towns, there is nothing which prevents the officials thereof from transacting business on a legal holiday, unless by so doing an unlawful preference should be accomplished.

Assuming that this meeting was duly called in the manner specified in section 131 of the Town Law and the town board actually and necessarily devoted some service to the town at such meeting, I am of the opinion that they had a legal right to meet on a holiday, and that they are entitled to compensation for services so rendered at the rate fixed by, or pursuant to, section 85 of the Town Law.

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In the Matter of the Provisions of the HIGHWAY LAW, SECTION 49, and of the TOWN LAW, SECTION 43, Relative to Town Property

(Dated April 7, 1916)

**Authority of town board and town superintendent of highways.**

Neither the town board nor the town superintendent of highways has power to sell machinery, implements or other personal property belonging to the town. Such power is vested in the electors of the town to be exercised by them at a town meeting.

H. M. Morrison, Supervisor, Tunesassa, N. Y., submitted a statement that the town board of the town of Elko had determined to sell to another town a culvert form owned by the town, and thereupon submitted an inquiry as follows: "The town board of the town of Elko determined to sell to another town a culvert form owned by the town.

"Has the town board of the town the power to dispose of highway machinery, or is that power vested in the town superintendent of highways?"

TRAVIS, Comptroller.—Section 49 of the Highway Law reads, in part, as follows: "The town superintendent of highways may, with the approval of the town board, purchase for the use of the town, stone-crushers, steam-rollers, \* \* \* tools and other implements \* \* \*. All road machinery, stone-crushers, \* \* \* tools and other implements owned \* \* \* by the town \* \* \* shall be used by the town superintendent in such manner and at such places \* \* \* as he shall deem best. They shall be under the control of the superintendent and be cared for by him at the expense of the town \* \* \*."

I can find no provision of law, and have been referred to none, relating to the sale of town road machinery or implements.

In view of the fact that town officers possess only such powers as are expressly conferred by statute, in the absence of such provisions, it is my opinion that no town officer or board may dispose of any property owned by the town.

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Subdivision 12 of section 43 of the Town Law says, that the electors of each town may "direct the sale and conveyance by the supervisors, in the name of the town, of property owned by it."

I am, therefore, of the opinion that neither the town board nor the town superintendent of highways has the power to sell machinery, implements or other personal property belonging to the town, but that such power is vested in the electors of the town, to be exercised by them at a town meeting.

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In the Matter of the VILLAGE LAW, SECTIONS 52, 102, 108 AND 331-a, Relative to Publication of Notices

(Dated April 7, 1916)

Rate of compensation as established by statute does not control the rates for technical notices and papers.

The statute prescribing the maximum compensation which may be allowed for printing village notices applies only to notices required by statute to be published; for example, notices of election, of the completion of an assessment roll and the annual report of the village treasurer. It does not apply to the publication of a notice soliciting bids for the construction of village water works.

Although not expressly required by statute to advertise for bids for the construction of a water works system, such authority is believed to be incidental to the power to contract, and for the insertion of such a notice in the *Engineering News*, the auditors may allow a reasonable compensation.

The *Engineering News*, a technical publication in New York city, submitted a statement of facts and an inquiry based thereon as follows:

"An incorporated village of the State of New York published in the *Engineering News*, a technical paper printed in New York city, an advertisement soliciting bids for the construction of a municipal village water works.

"(1) Does chapter 401 of the Laws of 1915, section 331-a of the Village Law, fix the compensation which may be paid for publishing this notice?

"(2) Should the *Engineering News* be considered a newspaper?"

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TRAVIS, Comptroller.— Section 331-a of the Village Law, added by chapter 401 of the Laws of 1915, reads in part, as follows: "The compensation to be allowed to the printer of a newspaper for the publication of an ordinance, notice or other advertisement required by this chapter to be published shall be fixed by the board of trustees of the village and shall not exceed the following rates: Fifty cents per folio for the first insertion and twenty-five cents per folio for each subsequent insertion."

In connection with such publications, this statute uses the words "required by this chapter." I am of the opinion that this provision applies only to the publication of those notices, ordinances and advertisements required to be printed or published pursuant to some direction or authority contained in the Village Law, as for example, the publication of a notice of the annual election (Village Law, § 52), publishing the annual report of the village treasurer (Id. § 102), notice of completion of the annual assessment rolls (Id., § 108).

The publishing of an advertisement for bids in connection with the construction of a municipal village water plant does not appear to be required by the Village Law, and, for that reason, does not come within the class of advertisements enumerated in section 331-a of that act.

Although the proper authorities of the village do not appear to be authorized or required expressly to advertise for bids for the construction of a water plant, I believe the power so to do is incidental to the power to contract, and that, when they ordered such notice to be printed in the *Engineering News*, they were acting in the corporate interest of the municipality.

I, therefore, conclude that this publication is not of the class of advertisements referred to in section 331-a of the Village Law; that the authorities of the village had the power to authorize it, and that the auditing authorities of the village may allow a fair compensation for its publication. What is fair and reasonable is a question of fact to be determined by investigation.

As to whether the *Engineering News* should be considered to be a newspaper, within the meaning of the laws requiring publication of notices in newspapers, the case of *Williams v. Colwell*, 14 App.

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Div. 26, is in point. It was held in that case that the *Daily and Mercantile Review*, a paper publishing two editions daily, containing among other things, "several columns devoted to general advertising, to the publication of local and other news of general interest" and having a general circulation, and which was printed in sheet form like other newspapers and at frequent intervals, came within the usual conception of a newspaper.

From a decision in that case, I infer that a purely technical paper, not printing general or local news and not having general circulation, is not a newspaper within the meaning of the law.

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In the Matter of the JEFFERSON COUNTY TAX LAW, Chapter 157,  
Laws of 1883, not Repealed by the General Tax Law

(Dated April 17, 1916)

**Duty of county treasurer in regard to certain unreturned taxes.**

Since chapter 157 of the Laws of 1883, a special act applicable only to Jefferson county, has been twice amended since the passage of the General Tax Law (Laws of 1896, chap. 908), it is assumed that it has not been repealed by implication and is still in force.

If a supervisor in Jefferson county fails to procure and return to the county treasurer a proper description of lands on which taxes remain unpaid, the amount of such taxes should be charged to the tax district wherein the premises are located.

The county treasurer of Jefferson county submitted a statement of facts and inquiries based thereon as follows:

"The Tax Law provides that with twenty days after the county treasurer receives from the town collectors, a list of unpaid taxes, he shall transmit to each supervisor a list thereof, and within thirty days thereafter, if possible, the supervisor shall return to the treasurer a description of such property on which the tax is unpaid and described all taxes thereon, so that the treasurer may legally sell the same for taxes."

"(1) If the supervisor fails to do this, what is my remedy?"

"(2) Who shall determine the amount the supervisor may charge and collect for furnishing such descriptions?"



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TRAVIS, Comptroller.—The county treasurer fails to state whether answers to the foregoing inquiries are requested under the General Tax Law of the State (Consol. Laws, chap. 60) or pursuant to chapter 157 of the Laws of 1883, an act providing for the enforcement of the collection of taxes in the county of Jefferson.

It appears that the Jefferson county special act was amended in some particulars by chapter 159 of the Laws of 1896 and by chapter 213 of the Laws of 1899. Therefore, following the decision of the Court of Appeals in *Carrol v. McArdle*, 216 N. Y. 232, it is assumed that the special act applicable to Jefferson county was not repealed by implication by the General Tax Law, chapter 908 of the Laws of 1896.

Section 3 of the Jefferson county act reads in part as follows: "The amount of taxes, fees and interest thereon, as herein provided, upon any land rejected by the treasurer and returned to the supervisors, the proper description of which shall not be furnished on or before the first day of June annually, *shall be charged to the town or city* where the same exists, and the board of supervisors, at its next succeeding annual session, shall levy the amount thereof upon such town or city as deficiencies therein."

I therefore conclude in answering inquiry No. 1 that in case of the failure of a supervisor to procure proper descriptions the amount of taxes, fees and interest chargeable against respective parcels of real property, for which the county treasurer has not received descriptions as required, shall be charged against the tax district (town or city) wherein the premises are located.

With reference to inquiry No. 2, it is observed that section 3 of the Jefferson county act requires the supervisors to "cause a correct description of the lands so imperfectly described to be made and returned to said treasurer," and section 5 thereof makes the expenses of procuring descriptions "a charge on the lands sold, and shall be added to the other charges thereon." No limitation is placed upon the amount of expenses which may be incurred in procuring a description of the premises by the supervisor either in the Jefferson county special act or in the general tax law.

It should be noted, however, that it is the "expense of procuring descriptions" that may be returned by the supervisor to the

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county treasurer and added to the other charges against the parcel described. Nothing is said of the compensation of the supervisor. Having in mind the general rule that a public officer is entitled to no compensation unless the statutes specifically attach it to the office, I am of the opinion that the supervisor may not lawfully include in the expense of procuring descriptions any charge for his own services. I think he may return to the county treasurer as such expense only the sums actually and necessarily expended by him in procuring the description.

The county treasurer should, in my opinion, require the supervisor to itemize the statement of expenses against each parcel, and probably require the submission of supporting vouchers showing the payment of the expense.

However that may be, it must be remembered that a supervisor can not be reimbursed for such expenses until he has presented a claim therefor to the board of supervisors of the county, which claim must be verified and audited and allowed by the board before payment by the treasurer.

As I view the Jefferson county special act, it is the duty of the county treasurer to satisfy himself that the sums returned by the supervisors have been actually expended in procuring the several descriptions. When this is made to appear to his satisfaction, it is not his duty to criticize the amount thereof. He has no discretion in this respect. It is his duty to add such amount to the other charges on the parcel of real property for which the description was obtained. If a parcel is sold at the tax sale to a third person, that third person pays the amount of the charges. If the county bids in the parcel and a certificate is not assigned or the property not redeemed within one year, then under section 6 of the Jefferson county act, the amount thereof is to be charged back to the tax district in which the real property is situated.

It will, therefore, be observed that in the final analysis the county is saved from all damage or loss, and the fact that the tax district may ultimately be required to bear the expense of procuring descriptions should have a tendency to keep the expense as low as possible.

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In the Matter of the Provisions of the CODE OF CRIMINAL PROCEDURE, SECTIONS 3325, 3328, 3332 AND 740-b as to Constables' Fees

(Dated April 24, 1916)

In criminal actions or proceedings a town constable is not entitled to a fee for attending to certain duties.

The Code of Criminal Procedure specifies the fees which may be charged by and allowed to town constables in criminal actions and proceedings. No fee is allowed to a constable for attending Justice's Court. No fee is, by statute, allowed to a constable for services in summoning a jury.

W. C. Nichols, Mamaroneck, N. Y., submitted an inquiry as follows:

"(1) Is it lawful for a town constable to charge against the town or county a fee of fifty cents for attending justice's court in criminal actions or proceedings?"

"(2) Is it lawful for a town constable to charge the town a fee of one dollar and fifty cents for summoning a panel of jurors in criminal actions or proceedings?"

TRAVIS, Comptroller.—I deem it to be the established law of this State that a public officer is entitled to no compensation for the performance of a public service unless the law attaches it to his office. *Fitzsimmons v. City of Brooklyn*, 102 N. Y. 536; *Matter of Town of Hempstead*, 36 App. Div. 328.

It is incumbent upon a person making a charge against a town to make plain that such charge is in all respects a legal one and authorized by some law. *Matter of Town of Hempstead*, *supra*, 337.

Section 67 of the Public Officers Law provides that each public officer upon whom a duty is expressly imposed by law must execute the same without fee or reward except where a fee or other compensation therefor is expressly allowed by law.

Section 740-b of the Code of Criminal Procedure specifies the fees which may be charged by and allowed to town constables for

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their services in criminal actions and proceedings. No fee is provided to be paid to a constable for attendance at Justice's court. It does specify that a constable shall receive "for taking charge of a jury during their deliberations, fifty cents."

In *Matter of Town of Hempstead*, cited above, the precise question contained in inquiry No. 1 was before the court. I quote from that opinion: "So far as the items for attendance upon court when no jury was summoned, at the rate of fifty cents for each attendance, are concerned, no authority exists in law for such charge." This quotation finally and definitely disposes of inquiry No. 1.

Respecting inquiry No. 2, I find that section 702 of the Code of Criminal Procedure provides that a defendant may demand a trial by jury in a Justice's Court; that section 703 outlines the method of summoning the jury, and provides that the justice may order or direct any constable of the county to summon the persons drawn as jurors to appear before the court; that section 704 makes it the duty of the constable to summon each juror personally, and that section 709 provides for the punishment of a constable if he fails to summon the jury in accordance with the order of the justice.

I am referred to no statute and can find none which expressly or by necessary implication gives, allows or permits a constable to charge one dollar and fifty cents or any other sum for his services in summoning the jury.

The constable who submitted this inquiry states in his letter that it has been customary in the town of Mamaroneck to allow the constable, for summoning a jury in a criminal action or proceeding, one dollar and fifty cents, and that a like fee is allowed for summoning a jury in a civil case.

Section 3323 of the Code of Civil Procedure provides that a constable shall receive one dollar and fifty cents "for notifying the jurors to attend a trial." The practice is, therefore, regular in so far as it applies to civil actions and proceedings. In such cases the fees are paid by litigants, not by the town. The constable may require, in a civil action or proceeding, the payment of

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his fees in advance by the party to the action, for whom they are performed. Code Civ. Pro., § 3328. A constable is not entitled by reason of section 3323 of the Code of Civil Procedure to a fee of one dollar and fifty cents for summoning a jury in a criminal action or proceeding because section 3332 of the Civil Code expressly provides that that title does not apply to a service rendered in a criminal action or special proceeding in a court or before an officer.

I must, therefore, conclude, respecting inquiry No. 1, that a town constable may not lawfully charge the town a fee of one dollar and fifty cents or any other sum for his services in summoning a jury in a criminal action or proceeding.

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In the Matter of the Provisions of the HIGHWAY LAW, SECTION 90, Relative to the Authority of Town Superintendent of Highways

(Dated April 25, 1916)

**Indebtedness on account of highway repairs cannot exceed statutory limitations.**

Town superintendents of highways are charged with the duty of keeping town highways in repair as independent officers and not as agents of the town and, when they contract for ordinary repairs, if they exceed the statutory limitations, the liability is assumed by them personally and not as agents of the town.

George H. Leicht, town clerk, Hancock, N. Y., submitted a statement of facts and inquiries based thereon as follows:

"A town superintendent of highways authorized work to be done on the town highway during the latter part of October, after the highway moneys appropriated for that purpose during the current year had been expended and the parties performing such labor desired reimbursement.

"(1) Can the town board of a town in which the labor was performed, issue temporary certificates of indebtedness for the amount of the claim for services, which certificates are to be paid out of highway moneys raised during the ensuing year?

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"(2) If such certificates of indebtedness cannot be legally issued, in what manner or under what procedure could the claim be paid?"

TRAVIS, Comptroller.—Section 90 of the Highway Law provides that the town superintendent shall, on or before the thirty-first day of October of each year, render a written statement specifying in detail the amount of money needed for highway maintenance and such statement shall be subdivided in order to specify in particular the following purposes for which money shall be raised.

*First.* The amount of money necessary to be levied and collected for the repair and improvement of highways, etc.

*Second.* The amount of money necessary to be levied and collected for the repair and construction of bridges having a span of five feet or more.

*Third.* The amount of money necessary to be levied and collected for the purchase, repair and custody of machines and implements to be used on the highway.

*Fourth.* The amount of money necessary to be levied and collected for the removal of obstructions caused by snow, etc.

The various amounts specified in such statement shall not exceed certain limitations which are prescribed in section 94 of the Highway Law. If the town superintendent is of the opinion that an amount in excess of the limitations therein prescribed should be raised by tax, the reason therefor should be clearly set forth in his statement. No discretion appears to be vested in a town superintendent in relation to additional expenditures except in cases of emergency such as floods, etc., and no latitude is granted by the statute with respect to expenditures. There does not appear to be any provision in the Highway Law authorizing the town superintendent to create a debt against the town except in the manner prescribed in section 90.

Town superintendents of highways are charged with the duty of keeping town highways in repair as independent officers and not as agents of the town and when they contract for ordinary repairs,

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Comptroller

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it is as such officers and the liability therefor, if they exceed the statutory limitation, is assumed by them personally and not as agents of the town.

It is incumbent upon a contractor or laborer performing services in connection with the maintenance of town highways, to ascertain whether or not funds available for the purpose of paying for such services exist, and in the event that the town superintendent has exceeded his authority and authorized the performance of labor for the payment of which there are no available funds, the town can in no wise be construed as being liable therefor. The only authority vested in a town superintendent in his official capacity as such is clearly outlined in the statute and there does not appear to be any provision in the Highway Law which empowers the town superintendent to enter into any contract for and in behalf of the town and therefore no contract that a town superintendent may enter into can be deemed the contract of the town and no action can be maintained to enforce the liability of the town upon any such contract since no such liability exists.

In conclusion, the department notes in the statement of facts and conclusions of law resulting therefrom an apparent hardship passing to the contractor or laborer, yet the statutory requirements must be strictly adhered to and no discretion appears to be vested in the town which can be invoked to alleviate the apparent hardship thus imposed.

I am informed by the State Highway Department that certificates of indebtedness issued by a town would not be accepted under circumstances described in the statement of facts herein, except when the reason for the expenditure was the occurrence of a flood or other emergency rendering travel on the highway affected unsafe. There is no proceeding with which the department is familiar that could be resorted to for the payment of such bills.

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Comptroller

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**In the Matter of the Provisions of the CODE OF CIVIL PROCEDURE,  
SECTIONS 1237 AND 3301, Relative to County Clerk's Fees of  
Rensselaer County**

(Dated April 25, 1916)

**The county clerk of Rensselaer county is now a salaried officer and must turn in all fees to the county.**

The office of the county clerk of Rensselaer county is made a salaried office by chapter 244 of the Laws of 1915, and the clerk is required to collect all legal fees for the benefit of the county. When acting as clerk of the court, he is entitled to a fee of one cent per folio for comparing and certifying a printed copy of a judgment roll or other order appealed from.

An order discontinuing an action is not a final order within the meaning of section 3301 of the Code of Civil Procedure, for the filing of which a clerk is entitled to a fee of fifty cents. For entering such an order he is entitled to a fee of ten cents for each folio, exceeding five.

Hon. Hans Dahl, Rensselaer county clerk, Troy, N. Y., submitted a statement of facts and inquiries based thereon as follows:

"Chapter 244 of the Laws of 1915 provides that the office of county clerk of Rensselaer county shall be a salaried office. Section 3 of that statute provides that all the fees, emoluments and perquisites which such clerk shall charge or receive or which he shall legally be authorized, required or entitled by law to charge and receive shall belong to the county of Rensselaer and that it shall be his duty to exact, collect and receive the full amount by law allowed on all such fees, emoluments and perquisites for said county. The clerk has been requested to certify a printed case or record on appeal in a special proceeding and also enter, in connection with another proceeding, an order of discontinuance.

"(1) What is the correct fee to be charged for services in relation to the certification of the papers on appeal?

"(2) Is an order of discontinuance a final order within the meaning of section 3301 of the Code of Civil Procedure for which a fee of fifty cents may be charged for filing?"

TRAVIS, Comptroller.—Section 3301 of the Code of Civil Procedure is entitled "Clerk's fees in civil cases generally." The sub-



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divisions of this section which are pertinent to the inquiry herein are as follows: "Except as otherwise prescribed, \* \* \* each clerk of a court of record is entitled \* \* \* to the following fees: For a certified or other copy of an order, record or other paper entered or filed in his office, five cents for each folio. Where, on an appeal from a judgment or order a party shall present to the clerk a printed copy of the judgment-roll or order appealed from, it shall be the duty of the clerk as required to compare and certify the same for which service he shall be entitled to be paid at the rate of *one cent per folio*."

Section 1237 of the Code of Civil Procedure defines or describes the component parts of a judgment-roll and the following excerpt is quoted from that section: "If judgment is taken after a trial, the judgment-roll must contain the verdict, report or decision; each offer, if any, made as prescribed in this act, *and the exceptions or case then on file*."

Therefore, a completed judgment-roll, if judgment is taken after trial, must contain a case and exceptions however voluminous it may be.

Rule 34 of the General Rules of Practice provides in part as follows: "A case and exceptions shall contain all the evidence by question and answer, the rulings of the court and the exceptions of all parties to the record."

In connection with an appeal, rule 41 requires that "all the foregoing papers shall be certified by the proper clerk or be stipulated to be true copies of the original."

It is a well established rule that whenever either party desires to appeal the judgment-roll should contain a case and exceptions in order that the court of appellate jurisdiction may have before it to be reviewed the facts as deduced by the testimony in order that the law governing the case may be applied. *Conoly v. Conoly*, 16 How. Pr. 224.

In view of the foregoing correlation of provisions contained in the Code of Civil Procedure and the General Rules of Practice, it is my opinion that a county clerk, acting as clerk of the court, is entitled to a fee of one cent per folio for comparing and certify-

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ing a printed copy of a judgment-roll or other order appealed from and that the judgment-roll includes all the papers intended to be used on an argument or such as are generally known as the appeal book, and that the provisions of section 3301 of the Code of Civil Procedure which provide that clerks are entitled to five cents per folio for a certified or other copy of an order, record or other paper entered or filed in his office, do not apply to the facts submitted herein.

Referring to the query in relation to the nature of an order discontinuing an action as to whether it constitutes a final order within the meaning of section 3301 of the Code of Civil Procedure whereby a county clerk is entitled to a fee of fifty cents for the filing thereof, I am of the opinion that it is not such an order. Section 3301 authorizes a clerk to charge a fee of fifty cents for entering a *final judgment* in an action or entering a final order in a *special proceeding*. An order discontinuing an action is not always final and it is not a final order in a special proceeding. I believe, however, that when such an order exceeds five folios a clerk may charge a fee for entry thereof under authority of that subdivision of section 3301 which reads as follows: "or entering any other order or an interlocutory judgment, ten cents for each folio, exceeding five."

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In the Matter of the Provisions of the HIGHWAY LAW, SECTIONS  
192 TO 195 INCLUSIVE, Relative to Town Highways

(Dated May 12, 1916)

**Authority of highway commissioners to employ stenographer—limitation as to amount of his claim.**

Under certain conditions commissioners appointed to lay out a new highway may employ a stenographer to record the minutes of hearings and to transcribe the same. The board of town auditors is authorized to determine the necessity for such employment and the reasonableness of the charges therefor.

W. K. Dunwell, town auditor, Southhampton, N. Y., submitted a statement of facts and inquiries based thereon as follows:

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“Commissioners appointed to investigate an application to lay out a new town highway, pursuant to sections 192 to 196 of the Highway Law, employed a stenographer to take and transcribe the proceedings of the commission. The stenographer presents to the town board of auditors, for audit, an account containing charges at the rate of ten dollars per day, for services at the hearing, a flat charge of two dollars and fifty cents for each day's expenses, and twenty-five dollars for each of three copies of the minutes of the hearings. Apparently one copy of the proceedings was furnished to the attorney for the applicant, another copy to the attorney for the town and a third copy to one of the three commissioners.

“Is the stenographer's claim a legal charge against the town, and must the town board of auditors audit and allow it in the form presented?”

TRAVIS, Comptroller.—Section 193 of the Highway Law provides that an applicant must submit with his application to have a new highway laid out a written undertaking executed by one or more sureties and approved by the county judge, to the effect that if the commissioners appointed determine that the proposed highway is not necessary the sureties will pay the commissioners their compensation at the rate of four dollars for each day necessarily spent and “*all costs and expenses necessarily incurred in the performance of their duties.*”

The facts before me do not indicate whether or not this application did succeed. If it did not, the compensation and expenses of the commissioners are not properly and legally chargeable against the town. See *Patton v. Miller*, 28 App. Div. 517, 518. In that case the court said: “The fact seems to be that, if the application to open the highway fails, no provision is made for the compensation of the commissioners in excess of the sum of fifty dollars (now one hundred dollars) and the commissioners must be deemed to accept their appointments with knowledge of that fact.” So in this case, if the application failed, the commissioners and the stenographer employed by them must be deemed to have performed the services with the knowledge of the fact that in case the application failed they could not in the aggregate receive

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more than \$100. If, on the other hand, the application succeeded, the compensation of the commissioners and all costs and expenses necessarily incurred by them are chargeable against the town.

The commissioners did not and have not the power to fix the compensation of the stenographer. In fact, they did not necessarily have the power to employ a stenographer. Whether they had that power is dependent upon all the circumstances. Stated differently, it is for the board of auditors to determine whether the employment of a stenographer was necessary under the circumstances.

I can conceive that where little or no testimony is taken the services of a stenographer are not necessary. In other cases, where considerable testimony is taken, the proceedings will be hastened and facilitated by the employment of a stenographer, and in such cases I believe the commissioners are justified in employing one and the expense is one necessarily incurred. As to that feature of the case, the board of town auditors is the sole judge in the first instance.

If they determine that the expense was not necessarily incurred, they should refuse allowance of the claim. The claimant has his remedy by appropriate legal proceedings to review the action of the board.

If it be determined that the stenographer was necessarily employed, the board of auditors should then determine whether he was actually engaged on the days for which he charges compensation. If it be found that he was so employed, then the board should determine the reasonableness of his charge. As said before, they are, in the first instance, sole judges of this fact. If the claimant feels aggrieved by their decision, he may review it in proper legal proceedings.

The board of auditors should not allow such items as "July 15, 1914 — Expense, \$2.50." They should require the claimant to fully itemize his bill, showing what items of expense he incurred.

Respecting the three charges of twenty-five dollars each for furnishing copies of the proceedings, the board of auditors should first determine the necessity for having furnished three copies. It may be that not more than one was actually needed. Again if

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the proceeding was a complicated one, it may be held that the expense of procuring three copies was necessarily incurred.

It is also for the board to determine whether the charge for the copies was reasonable. Judging from the number of pages (103), I infer that the stenographer may have calculated the charge at the rate of twenty-five cents per page or ten cents per folio. That rate is not greater than is allowed to court stenographers for transcribing stenographic minutes of court proceedings, but probably is greater than is allowed in other instances. For example, the State Comptroller pays stenographers to write the reports of examinations made pursuant to article 3 of the General Municipal Law eight cents per page for the original and four cents per page for each of the copies of the report. Sometimes an original and two copies are made, and, on other occasions, an original and three copies. That rate is a low rate. I mention these two illustrations as probably being the extremes; not that I suggest to you to follow them, but simply as items of information which may be useful to the board in arriving at a conclusion.

I, therefore, conclude that under certain conditions commissioners appointed to lay out a new highway may employ a stenographer to record the minutes of hearings and to transcribe the same, and that it is within the power of the town board of auditors to determine the necessity for the expenditure and the reasonableness of the charges therefor.

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In the Matter of the Provisions of the VILLAGE LAW, SECTIONS 89, 101, 101-a, 102, 110 AND 128, as to Village Funds

(Dated May 31, 1916)

The board of trustees of a village may in certain cases transfer a surplus in one fund to another fund.

In a village operating under the Village Law, the board of trustees may transfer a surplus in the sewer fund to the light fund, provided such surplus consists of revenues derived from taxation under subdivision 4 of section 110 of the Village Law, or of revenues other than from direct taxation not specifically required to be credited to the sewer fund.

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Hon. Lewis E. Felix, New York city, submitted a statement of fact and an inquiry based thereon as follows:

"In a village operating under the general village law, a deficiency exists in the light fund and a surplus in the sewer fund, they being two of the funds enumerated in section 101 of the village law. Can the board of trustees lawfully direct the transfer of the surplus existing in the sewer fund to the light fund, thereby supplying the deficiency in that fund?"

TRAVIS, Comptroller.—The board of trustees of the village "has the management and control of the finances and property of the village," except such as may be under the jurisdiction of some other officer, board or commission of the village. Village Law, § 89, subd. 1.

The funds of a village operating under the Village Law are classified as to the purposes for which they are available, as specified in section 101 of that act. The last paragraph of that section reads in part as follows: "Expenditures for the purposes specified in either subdivision must be made from the fund therein described."

In section 128 it is said: "No contract shall be made involving an expenditure by the village unless the money therefor is on hand or a proposition has been adopted authorizing the board of trustees to raise such money."

The board of trustees of the village is required, pursuant to section 102 of the Village Law, to make a statement by funds of the amounts estimated by them as necessary to be raised during the next fiscal year. That statement is required to be published and posted "for at least one week prior to the annual election."

It is evident, I believe, from an examination of the entire law, that the estimate so made and published has no binding force and effect. It is, as I view it, an expression of opinion by an outgoing board of trustees of the amounts necessary to be raised for the several funds enumerated in section 101. No express provision is contained in the law limiting the officers to be elected at the next election to the sums so estimated as being necessary for the maintenance and support of the village government.

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Section 110 provides for the levy of a tax by the board of trustees elected immediately after the estimate prepared by the preceding board has been compiled and published. It is important that we observe no provision contained in this or any related section limiting the board of trustees in the levy of a tax to the sums estimated by the preceding board, nor one requiring that there be specified in the tax budget the amount to be levied for each of the funds mentioned in section 101. It does limit the amount which may be raised by tax for highway purposes to not exceeding one-half of one per centum of the total valuation of taxable property assessed upon the annual assessment roll of the last preceding year, and it limits the amount which may be raised by tax to meet other expenditures not enumerated in section 110 to one-half of one per centum of such total valuation.

A careful perusal of all the financial provisions of the Village Law indicates, and, in fact, expressly provides that accounts shall be kept by funds. It does not, however, provide in each instance how the revenues, whether from direct taxation or otherwise, shall ultimately reach, or be credited to, the enumerated funds.

It is, of course, entirely proper and, I believe, desirable that the board of trustees should in levying the tax specify the amount to be raised for each fund mentioned in section 101 or created pursuant to its terms. This is, however, not required, and if not done at the time the tax is levied, the board of trustees can, in my opinion, at any time thereafter, allocate to the several funds such portion or portions of the tax levy as in its judgment seems appropriate or desirable. Even though the board should in levying the tax specify the portion thereof to be applied to each of the funds for which revenues are to be provided, it would not by that act alone assign to specific funds revenues from sources other than taxation. There may be and probably are existing provisions of law directing certain specific revenues to be applied to definite funds. However that may be, there is a class of revenues, as, for instance, the bank tax and mortgage tax, not definitely assigned by law to any particular fund, and as to all such I am of the opinion that the board of trustees may in its discretion appropriate or assign them to any of the funds available to pay current

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expenses of operations with the possible exception of the highway fund, in connection with which certain limitations appear to be imposed by section 110.

Section 101-a of the Village Law, added by chapter 52 of the Laws of 1916, reads as follows: "If there shall be outstanding no obligations of the village on account of a particular department, and if, after the payment of the current expenses of such department, there shall remain a surplus in the fund of that department, such surplus may be applied to the payment of any existing obligation of the village or transferred to the general fund."

The limitation upon the power of village officials to contract, contained in section 128 quoted above, has the effect, as I view it, of limiting the expenditures of the village for a given fiscal period to the income or revenue of the village.

By reason of all these things and having in mind the plan outlined in the Village Law, pursuant to which a village operating under its provisions is to be financed, I conclude:

*First.* That a surplus in a special fund of the class mentioned in subdivision 9 of section 101 of the Village Law may be transferred only to the general fund.

*Second.* That the village board can not lawfully transfer to the street fund from other village funds revenues not specifically appropriated by or pursuant to law for its use, a sum which in addition to the amount levied for that fund will exceed one-half of one per centum of the total valuation of the property assessed upon the annual assessment roll of the last preceding year.

*Third.* Conversely, that there can not be transferred from the street fund to any of the other funds provided any part of the sum levied by tax or of the poll taxes or of other revenues of that fund provided by or pursuant to law to be credited to it.

*Fourth.* That revenues of any fund derived as a result of a proposition adopted by the electors pursuant to law, can be devoted only to the appropriate fund for which they were provided; or, when that object has been served, the surplus may be applied to the payment of any existing obligation of the village or transferred to the general fund.



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*Fifth.* That revenues derived from direct taxation or from other sources not specifically applicable to a particular fund or funds, under the statute, but the subject of appropriation, assignment or election by the board of trustees, may, after having been set aside for a particular fund, if it develop that that fund does not need them in whole or in part, be applied to the payment of any existing obligation of the village or transferred to another fund provided to pay expenses of current operations of the village.

It is my opinion that the board of trustees of this village may transfer a surplus existing in the sewer fund, not needed during the year for the purposes of that fund, to the light fund, provided that surplus is made up of revenues derived from taxation under subdivision 4 of section 110 of the Village Law or of revenues other than from direct taxation not specifically provided by law to be credited to the sewer fund.

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In the Matter of the TOWN LAW, SECTIONS 47 AND 340 as to  
Special Town Meetings

(Dated May 31, 1916)

**Qualification of voters at such meeting — notice of such meeting.**

At least twenty days before any special town meeting the town clerk is required to give notice thereof in the manner prescribed by the statute.

An elector is not entitled to vote upon a proposition to raise money for the purchase of a site and the building of a town house unless he or his wife is the owner of property in the town assessed to him or her upon the last preceding assessment roll thereof.

A statement of facts and inquiries based thereon were submitted as follows:

“The town of Russell held a special town meeting for the purpose of voting on a proposition to incur a bonded indebtedness amounting to \$2,000 for the purpose of erecting a town hall. The result of the election indicated an affirmative vote.

“At the meeting herein referred to, several voters offered their

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votes who had purchased real estate in said town since the last compilation of the assessment roll.

"*First.* Was the ten day notice sufficient compliance with the statutory requirements and the contemplated bond issue legally authorized?

"*Second.* Were the electors whose names did not appear on the last preceding assessment-roll but who had purchased property within the town since the compilation of the assessment-roll entitled to vote?"

TRAVIS, Comptroller.—Section 47 of the Town Law provides as follows: "The town clerk shall, at least twenty days before the holding of any special town meeting cause notice thereof, under his hand, to be posted conspicuously in at least four of the most public places in the town and to be published once in each week for two consecutive weeks immediately prior to such special town meeting in two newspapers published in such town; if there be but one newspaper published in such town then in such newspaper and in the newspaper, published in the county, having the largest circulation in such town or if there be no newspaper published in such town then in the two newspapers published in the county, having the largest circulation in such town; which notices shall specify the time, place and purposes of the meeting."

Section 340 of the Town Law provides in part as follows: "The electors of any town in which there shall not be a town hall, at any biennial town meeting, or at a special town meeting lawfully called by the town clerk, may vote by ballot any sum of money for the purchase of a site and the building of a town house, or for the purpose of contributing to the erection of a building for joint use of a town and of an incorporated village within its limits."

It therefore appears that section 340 relating to appropriation for town house prescribes that the proposition shall be voted upon at any biennial town meeting or at a special town meeting lawfully called by the town clerk. The manner of calling a special meeting is fully outlined in sections 46 and 47 of the Town Law and the required notice of such meeting is specifically stated in section 47 heretofore quoted.

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Comptroller

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The courts have repeatedly held that the statute relating to notice of special town meeting must be substantially complied with in order to hold a valid election. The notice must be published for the time prescribed by statute and must be in the form and contain all the essential particulars required by the statute.

Where the notice of a bond election, as in this instance, fails to comply with the direct, specific and mandatory provisions relating thereto, the election is void. A bond issue predicated on the result of an illegally called special meeting would be invalid in its inception and the bonds incapable of negotiation. From a practicable view point it can readily be perceived that the prospective purchaser of such bonds would, under the advice of counsel, decline to accept the bonds and pay the purchase price therefor. The statute does not provide any alternative, and no authority appears to be vested in any town official to call or cause to be called a special meeting for the purpose of any bond election on a shorter notice than that prescribed in section 47. The defect is therefore jurisdictional and the only procedure open to the electors of the town is to call another special town meeting following all the statutory requirements in detail.

In answer to the second inquiry, section 54 of the Town Law is controlling. In chapter 63 of the Laws of 1909 the qualification of an elector to vote for a site for a town house was prescribed as follows: "An elector shall not be entitled to vote upon a proposition submitted for the purposes of section 340 of this chapter, unless he or his wife is the owner of property in the town assessed upon the last preceding assessment roll thereof."

Chapter 124 of the Laws of 1913 amends this section to read as follows: "An elector shall not be entitled to vote upon a proposition submitted for the purposes of section 340 of this chapter, unless he or his wife is the owner of property in the town assessed to him or her upon the last preceding assessment roll thereof."

Apparently some doubt as to the legislative intent in chapter 63 of the Laws of 1909 had arisen in that certain ambiguity existed as to whether or not the name or names of property owners who desire to vote should appear on the last preceding assessment roll

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or the property which they owned at the time of the election should appear thereon.

In the amendment to section 54 above quoted, the ambiguity is cleared by the insertion of the words "to him or her." Therefore, under the present statute, a prerequisite to the right to vote seems to be the fact that the elector's name and property owned by him appears on the last preceding assessment roll. In the light of the statute, a further discussion of the qualifications of electors to vote on the proposition for a bond issue for the erection of a town house is unnecessary.

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In the Matter of the Provisions of the MILITARY LAW, Section  
193 as to Armories

(Dated June 6, 1916)

Distinction between armories and other county buildings in regard to being supplied with the necessities by an individual who is a member of a board of supervisors.

A member of a board of supervisors is not debarred, because of his membership in the board, from entering into a contract for coal to be supplied to an armory. He is, however, debarred from contracting for coal to be used in other county buildings, since, as a member of the board of supervisors, he would participate in the audit of a claim in which he had a pecuniary interest.

A statement of facts and an inquiry based thereon is submitted as follows:

"The county treasurer of Jefferson county advertised for bids for furnishing the State armory coal supply for one year pursuant to section 193 of the Military Law, and upon opening the bids it was ascertained that the lowest bidder was a coal company, a member of which was also a member of the board of supervisors of said county. The same coal company was also the low bidder on the supply of coal to be used for county purposes for the ensuing year.

"*First.* Can a contract for furnishing coal for use in the armory be legally awarded to the coal company described above?

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*"Second.* Can a contract for furnishing the county supply of coal be legally awarded to the company described above."

TRAVIS, Comptroller.—Section 193 of the Military Law provides that the officer in charge and control of an armory outside of the city of New York shall, on or before the first day of September in each year, submit for approval to the commanding officer of the brigade or the major-general, an itemized estimate of necessary expenditures for the ensuing fiscal year, such expenditures to include, among other accessories, the cost of heating the armory. The various expenses enumerated in this section, including the cost of heating shall be deemed cost of maintenance within the provisions of the Military Law.

This section describes in detail the manner ascertaining to whom the various contracts shall be awarded; and, in relation to expenditures exceeding \$500, upon the requisition of the officer in charge and control of said armory, the county treasurer shall publicly advertise for ten days for sealed proposals for furnishing the required materials. The bids thus received shall be publicly opened and the contract awarded or bids rejected in accordance with the statute. After the material has been furnished pursuant to the contract awarded, the statute provides that no payment shall be made from the moneys for this purpose except upon the approval in writing of the officer making the requisition.

It does not appear that the board of supervisors or any member thereof as such possesses any authority or owes any duty in relation to the award of a contract or the audit of bills resulting therefrom. Under no possible construction of the statute could a member of a board of supervisors in his official capacity be deemed an interested party in relation to the audit or payment of a claim in connection with an armory. Therefore, in the case presented, the fact that a member of a board of supervisors is financially interested in the award of a contract to furnish coal for the armory can in no wise affect the validity of the contract to be entered into and should in no wise affect or influence the award thereof. The interest of the supervisor is that of a private individual and in this instance the fact that he occupied the office of

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supervisor should not mitigate against the diligent pursuit of his business.

The first inquiry is, therefore, answered in the affirmative.

In the second inquiry a different principle of law is involved.

The board of supervisors is the auditing agency of the county. The cost of furnishing coal for use in county buildings is a county charge. Therefore an interested member of a company to whom a contract might be awarded would stand in the dual capacity of buyer and seller. This is clearly contrary to public policy.

In *Beebe v. Supervisors of Sullivan County*, 64 Hun, 377, the court held: "The illegality of such contracts does not depend upon statutory enactment. They are illegal at common law. It is contrary to good morals and public policy to permit municipal officers of any kind to enter into contractual relations with the municipality of which they are officers. This principle applies with particular force to members of a board like a board of supervisors which not only makes the contract, but subsequently audits the bill."

In *Smith v. City of Albany*, 61 N. Y. 446, the court said: "If, then, the seller were permitted as the agent of another to become the purchaser, his duty to his principal and his own interests would stand in direct opposition to each other."

In *People ex rel Schenectady Illuminating Co. v. Board of Supervisors*, 166 App. Div. 758, it was held that a board of supervisors acting for a county, cannot make a valid contract to purchase chattels from a corporation of which a member of the board is an officer and stockholder and that this is true notwithstanding the fact that the supervisors knew nothing of the transaction and did not participate personally on behalf of either party and that the goods contracted for were fully worth the contract price. In discussing the principles of law involved in this case, the court said that this contract was necessarily void on the ground of public policy as the member of the board in question was the agent of two principals with conflicting interests — the agent of the board of supervisors whose interest it was to buy as cheaply as possible, and the agent of the corporation whose interest it was to sell as advantageously as possible.

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It can be readily perceived that a lax construction of the law with relation to questions of this character would quickly expand itself in every direction until the safeguards which the law has intended to establish would be eliminated, and opportunity thereby given for many illegal transactions between persons in their official capacity and in their capacity as private individuals with business interests.

The second inquiry is therefore answered in the negative.

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In the Matter of the Provisions of the VILLAGE LAW, SECTIONS  
110 AND 240, in Regard to Contracts for Street Lighting

(Dated June 26, 1916)

The purposes for which taxes may be levied by the board of trustees of a village without further authorization from the taxpayers are enumerated in section 110 of the statute.

The annual rent due on a lighting contract is a current operating expense, which must be included in and as a part of the sum to be levied pursuant to subdivision 4 of section 110 of the Village Law. It is not an "indebtedness" lawfully incurred within the meaning of that term as used in subdivision 2 of section 110 of the Village Law.

No village officer has power to incur an indebtedness payable from the street fund unless the money is on hand or a proposition authorizing the village board to raise the necessary amount has been duly adopted.

E. J. Vincent, clerk of the village of Ticonderoga, has submitted a statement of facts and an inquiry based thereon as follows:

"The clerk of the village of Ticonderoga submits the following:

"*First.* If the village of Ticonderoga has a contract for lighting the streets, which would cost practically \$2,000 for the year, would this board be authorized to levy that tax of \$2,000 to pay for lighting the streets pursuant to subdivision 2 of section 110?

"*Second.* If a certain sum should be due and payable at the present time from the street fund, would the board of trustees have the right to raise that amount to pay the debts now due from

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the street fund, and in addition thereto, the one-half of one per centum as specified in subdivision 3 for the street fund?"

TRAVIS, Comptroller.—I think both questions should be answered in the negative.

Section 110 of the Village Law states the purposes for which taxes may be levied by the board of trustees of a village without further authorization from the taxpayers, and limits the amount thereof. Stated briefly, the board of trustees may, without further vote by the taxpayers, levy a sum sufficient to meet (1) expenditures authorized at the annual or special elections, (2) the amount of indebtedness due and payable during the year, (3) a sum not exceeding one-half of 1 per centum for the street fund, (4) an additional sum not exceeding one-half of 1 per centum for other expenses, and (5) the poll tax. It is clear to me that the Legislature intended to limit the authority of the board of trustees to levy a tax to pay current operating expenses to not more than 1 per centum of the total valuation of taxable property, of which not more than one-half could be used for street purposes and one-half for other objects. If greater sums be needed to pay current operating expenses, it was the intention of the Legislature, as I view it, that the necessity therefor should first be passed upon by the taxpayers.

The first question raised by the clerk of this village involves or requires a construction of the word "indebtedness" as used in subdivision 2 of section 110. I assume that, acting under section 240 of the Village Law, a contract has been made in the name of the village for lighting streets for a period longer than one year at an annual rental fixed in the contract. The fact that such a contract has been made and that the annual rental for the current fiscal year approximates \$2,000, does not, in my opinion, create an indebtedness within the meaning of that term as used in the section mentioned above. It does create a contractual liability but, as I view it, no debt is created until the service has actually been rendered. For instance, if the lighting plant should be destroyed and the contractor thereby rendered unable to light the streets,



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it can not be said that the village is liable for the annual rental named in the contract.

That the word "indebtedness" is not susceptible of exact legal definition, is made plain in McQuillan on Municipal Corporations, volume 5, pages 4701, 4702, where it is said: "In determining the meaning of the words, the whole context of the constitutional or statutory provision must be examined, and its object ever kept in mind — the true spirit and purpose of the law. It has been held that the term should be given its general meaning, and should not receive a narrow or strained construction; but 'a careful examination of the decisions discloses the fact that in substantially every jurisdiction the word debt or indebtedness as used in the limitation placed upon municipal power is given a meaning much less broad than in general usage. This tendency has been more marked in some states than in others, with the result that the decisions are sufficiently at variance to justify fairly the statement of an eminent court that, in view of the ruling among the adjudged cases, it is not easy to affirm that the word debt has a firmly settled meaning.'"

Again, on page 4707 of volume 5 of the same treatise, McQuillan says: "Merely incurring a contingent future liability does not create an indebtedness. Thus, a contract to pay a fixed price annually, where contingent on the supply furnished, does not create an indebtedness."

And further, after discussing loans negotiated to pay expenses of current operations, he says, on pages 4712 and 4713: "Among the current expenses which may be incurred without exceeding the debt limit are the salaries of officers and employes; monthly *rental or installments for water, lighting or the like*; rent for suitable quarters for municipal officers; etc."

There is no requirement that a village contract for lighting its streets for a longer period than one year. It is permissive that it may do so.

If contracts were made annually for lighting the streets, the annual rental would necessarily be included in the sum to be raised pursuant to subdivision 4 of section 110. I can not conceive it to have been the intention of the Legislature that a board of

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trustees of a village could enlarge or increase its jurisdiction to levy a tax by electing to contract for the lighting of the streets for a longer period than one year. Such a proposition could not be entertained for a moment.

I therefore conclude, in answering question No. 1, that the annual rental due on the lighting contract is a current operating expense which must be included in and as a part of the sum to be levied pursuant to subdivision 4 of section 110, and that it is not "indebtedness" lawfully incurred within the meaning of that term as employed in subdivision 2 of the same section.

Respecting the second inquiry, I fail to see how "a certain sum" can "be due and payable at the present time from the street fund."

Section 128 of the Village Law reads in part as follows: "No contract shall be made involving an expenditure by the village, unless the money therefor is on hand or a proposition has been adopted authorizing the board of trustees to raise such money."

There is a limitation upon the power of village officials to contract. As I view it, no village official could incur or authorize to be incurred "a certain sum" payable out of the street fund unless the money to meet the expenditure was actually on hand or a proposition authorizing it and authorizing the village board to raise the necessary amount had been duly adopted.

If the money was on hand, it would not be necessary to raise a tax therefor. If these expenditures were made after the adoption by the taxpayers of a proposition authorizing the expenditure, then the board of trustees would be authorized to levy the necessary amount by tax under subdivision one of section 110.

I, therefore, conclude in answering inquiry No. 2 that there can not exist at the present time an "indebtedness of the village lawfully contracted," payable out of the street fund, which the board of trustees is authorized to include in the annual tax levy under subdivision 2 of section 110 of the Village Law.

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Fairport Village Charter (Laws of 1881, Chapter 638) Sections 16, 29 — VILLAGE LAW, Section 64, Articles 9, 10 — LAWS OF 1916, Chapter 52 as to Powers of Municipal Commission — Control of Revenues — Disposition of Surplus

(Dated June 29, 1916)

**A municipal board or commission created under authority of section 64 of the Village Law possesses all the powers of the village boards which it supersedes.**

Earnings accruing on account of an electric light plant owned by the municipality should be deposited with the village treasurer, who is required to execute and file an official undertaking in such sum and with such sureties as the board of trustees shall direct and approve.

Moneys deposited with the village treasurer are subject only to the orders of the board of trustees.

The commission has no authority to withdraw surplus funds from the village treasury for deposit or investment in interest bearing accounts. Village funds are required to be deposited in banks designated by the board of trustees. Interest earned thereon belongs to the village and must be credited by the treasurer to the proper funds.

A. C. Passage, member of the Municipal Commission, Fairport, N. Y., submitted a statement of facts and inquiries based thereon as follows:

"The municipal commission of the village of Fairport, N. Y., controlling the electric light, power and water plant, appointed and working under the general Village Law of the State of New York, desires to have its rights defined and submits the following questions:

"(1) We understand that all revenues accruing for the account of the municipal plant are to be deposited with the village treasurer elected by the people, and with no other person, and that it is the duty of the village trustees to see that such treasurer is properly bonded for the surety of the funds deposited.

"(2) Does the municipal commission have absolute control of all moneys deposited by it with the village treasurer for account of the municipal plant, and is the fund subject only to the order of

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the commission for the maintenance and operation expenses of the plant?"

"(3) Also, is it within the legal rights of the commission to withdraw a surplus from the village treasurer and deposit it in State or National banks for the purpose of further interest earnings, or should the commission instruct the village treasurer to deposit it in certain State or National banks designated by the commissioners."

TRAVIS, Comptroller.—Although the village of Fairport in the county of Monroe, N. Y., was originally incorporated under the provisions of chapter 426 of the Laws of 1847, the charter has been twice repealed and re-enacted. Its present charter appears to be chapter 638 of the Laws of 1881. There is no provision in this last mentioned statute for the appointment of a municipal commission and in answering this inquiry it is assumed that the municipal commission referred to has been appointed under authority of section 64 of the Village Law.

Section 64 provides that upon the filing of a certain certificate, all the powers, duties and responsibilities of separate village boards are transferred to the municipal board and that all property, records, books and papers in the possession of such separate boards shall, within fifteen days after such consolidation, be delivered to the municipal board. It appears, therefore, that in the village of Fairport the boards which ordinarily are described as the "board of water commissioners" and "board of light commissioners" are consolidated under the name of the municipal commission. The statutory powers of these separate boards will be found in articles 9 and 10 of the Village Law.

Although chapter 638 of the Laws of 1881 (the village charter) has been amended from time to time, no change appears to have been made in section 16. This section is in full as follows:

"§ 16. The treasurer shall receive all moneys belonging to said village and safely keep and disburse the same, in pursuance of the direction of the board of trustees, by warrant signed by the president or presiding officer, for the time being, and attested by the clerk; he shall make and keep a correct record of such receipts,

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specifying from what source the same was derived, and of all disbursements, and for what purposes, and from what sums the same were made during the year, and at any time when required by the board of trustees, furnish them with such statement in relation to matters pertaining to his office as the said board may by resolution demand, and duly perform such other duties as the board of trustees may ordain."

Subdivision 4 of section 29 of the charter provides that the trustees of the village shall have power to "*examine all legal and proper accounts and claims against the village, and to order warrants to be drawn on the treasurer for the payment of the same whenever proper funds are in the treasury applicable for such payment.*"

Although boards of water commissioners and of light commissioners have the general management and control of their respective plants, the Village Law confers upon them no power of audit nor any authority to order the disbursement of village funds.

Section 127 of the Village Law provides that if at any time the receipts of the water, light or other department, whether accruing from the earnings of the particular department, or by reason of the moneys appropriated for the use of such department, exceed the amount needed for current expenses, and the payment of the principal or interest due or to become due during the next fiscal year, the surplus may be transferred to the fund to be known as the sinking fund of the department and to be used in payment of the outstanding obligations or for future expenses of the particular department, for which such fund is created, and in case of the water or light department, may be used for the future expenses of that department if the rents or other income be insufficient for that purpose.

The determination of the question as to whether such surplus shall be applied to the sinking fund or for future expenses of the particular department appears to rest with the board of trustees and not with the municipal commission.

In view of the foregoing, the answers to the questions submitted are as follows:

*First:* Earnings accruing on account of the municipal plant

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should be deposited with the village treasurer. Section 58 of the Village Law requires the treasurer, before entering upon the duties of his office, to execute to the village and file with the village clerk, an official undertaking in such sum and with such sureties as the board of trustees shall direct and approve.

*Second:* The municipal commission has no control over moneys deposited by the commission with the village treasurer. These funds are subject only to the order of the board of trustees.

*Third:* It is not within the legal rights of the commission to withdraw the surplus from the village treasury and deposit it in State or National banks for the purpose of further earnings or to draw interest. Subdivision 20 of section 89 requires the board of trustees to designate banks for the deposit of all moneys received by the treasurer and the board may require of any such bank security for the repayment thereof. Section 81 of the Village Law provides that interest on village money belongs to the village, and must be credited by the treasurer to the proper fund.

As a general proposition, municipal corporations should not and, I believe under the law, are not authorized to maintain and operate water plants and electric light plants for purposes of gain. Neither should they be operated at a loss. The proper authorities should fix and establish rates to be charged to consumers, so arranged and graduated that each consumer will be required to pay, as nearly as may be, the cost of producing and delivering the quantity of water or the amount of electric current used or consumed through his service.

In calculating the cost, due consideration should be given to providing a fund for the amortization of the indebtedness or the depreciation of the plant as well as the sum necessary to pay current operating expenses. If the rates or rents are so adjusted that the plant is being operated at a profit and the surplus is used in reduction of general taxation, it means that persons to whom water or electric current is furnished are being taxed not in proportion to the amounts of taxable property owned by each but rather in proportion to the amount of water or electric current consumed. If, on the other hand, the rates or rents are fixed too low and the plant is not self supporting, it means that the owners

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of taxable property are required to contribute in part to the cost of producing and delivering a commodity to be applied to private use. Both of these conditions are foreign to the American system of supporting governmental agencies, as I understand it.

If, in this case, the receipts of the water or light departments exceed the amount necessary to pay current expenses and the sum necessary to pay bonds and interest falling due during the year, the board of trustees should, I believe, set aside such surplus by creating a sinking fund as provided in section 127 of the Village Law. The sinking fund may be invested as provided in that section. If it neglects or fails to set aside the surplus and create a sinking fund, then it is my opinion that the surplus must remain to the credit of the water department or the electric light department as the case may be. Should the board of trustee attempt to apply or use any part of the surplus for purposes other than for the benefit of the water or light department, I am of the opinion that it may be restrained from so doing in appropriate legal proceedings.

Chapter 52 of the Laws of 1916 is not applicable in this case for the reason that the village of Fairport has outstanding bonds or other obligations incurred by the water department.

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In the Matter of the Provisions of the VILLAGE LAW, SECTION  
101-a as to Surplus in Water Fund — Transfers

(Dated June 30, 1916)

**Disposition to be made of surplus in water fund — transfers.**

If there be no outstanding obligations of a village on account of a particular department, and if, after the payment of the current expenses of such department, there remains a surplus in the fund of that department, such surplus may be applied to the payment of any existing obligation of the village or transferred to the general fund.

Hon. C. S. Ferris, Potsdam, N. Y., submitted a statement of facts and an inquiry based thereon as follows:

“The water system of the village of Potsdam is owned by the

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village and is in charge of a board of water commissioners pursuant to sections 220-235 of the Village Law. The water department has no outstanding obligations and has accumulated a surplus fund of approximately \$15,000. The annual income from the water department is \$10,000 and upwards and the cost of maintenance is approximately \$5,000.

“Can the village authorities use a part or all of the accumulated surplus arising from the operations of the water system to liquidate an indebtedness arising from a bond issue other than for water purposes, the principal of which falls due this year, provided such authority shall be voted at a special meeting of the electors of the town, called for that purpose.”

TRAVIS, Comptroller.—Under the provisions of chapter 52 of the Laws of 1916, statutory authority was granted to villages to transfer the surplus arising in one fund to meet outstanding obligations properly chargeable to another fund. The recent enactment referred to constitutes section 101-a of the Village Law and reads as follows:

“§ 101-a. Application of surplus moneys of a department. If there shall be outstanding no obligations of the village on account of a particular department and if after the payment of the current expenses of such department there shall remain a surplus in the fund of that department such surplus may be applied to the payment of any existing obligation of the village or transferred to the general fund.

“§ 2. This act shall take effect immediately.”

While this seems to answer the inquiry propounded, I desire to incorporate herein a portion of an opinion written in a similar case relative to the rights, duties and prerogatives of a municipal commission controlling certain public utilities in a village.

“As a general proposition, municipal corporations should not, and I believe under the law are not authorized to maintain and operate water plants and electric light plants for purposes of gain. Neither should they be operated at a loss. The proper authorities should fix and establish rates to be charged to consumers, so arranged and graduated that each consumer will be



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required to pay, as nearly as may be, the cost of producing and delivering the quantity of water or the amount of electric current used or consumed through his service."

"In calculating the cost, due consideration should be given to providing a fund for the amortization of the indebtedness or the depreciation of the plant as well as the sum necessary to pay current operating expenses. If the rates or rents are so adjusted that the plant is being operated at a profit and the surplus is used in reduction of general taxation, it means that persons to whom water or electric current is furnished are being taxed not in proportion to the amounts of taxable property owned by each, but rather in proportion to the amounts of water or electric current consumed. If, on the other hand, the rates or rents are fixed too low and the plant is not self supporting, it means that the owners of taxable property are required to contribute in part to the cost of producing and delivering a commodity to be applied to private use. Both of these conditions are foreign and repugnant to the American system of supporting governmental agencies, as I understand it."

Section 127 of the Village Law provides for the creation and investment of a sinking fund to be used in payment of outstanding obligations or for future expenses of the department if the rents or other income be insufficient for that purpose. There being no outstanding obligations, in this instance, against the water department, the only reason for the creation of a sinking fund would be for the purpose of meeting "future expenses of the department if the rents or other income be insufficient for that purpose," and in the light of the financial report of the water system, the creation of a sinking fund for this latter purpose would appear impracticable. Hence I deem the quotation from a former opinion, which has been embodied herein, appropriate and worthy of your consideration.

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In the Matter of the Provisions of the CODE OF CRIMINAL PROCEDURE, SECTION 892, and Several Other Statutes as to Maintenance of Children Committed to Institutions

(Dated June 30, 1916)

The statute authorizing the commitment of a defendant to an institution must provide as to their support.

The statutes contain no uniform rule prescribing the locality chargeable with the maintenance of children committed to institutions and, to determine the question, reference must be had to the statute authorizing the commitment.

Everett Macy, Esq., superintendent of the Westchester County Alms House and Hospital submitted a statement of fact and an inquiry based thereon as follows:

"Mr. Everett Macy, superintendent of the Westchester county almshouse and hospital, states that in Westchester county poor persons are town, city or county charges 'according to the length of their residence in their respective localities.'"

He further says: "In this county, the custom has been established to charge for the care of all children committed to private institutions by the courts upon the town in which the committing magistrate lives regardless of the residence of the parents of the child, while dependent children have been charged upon the town in which the parents had a poor law settlement." He then asks:

"(1) What is the general custom in the counties of the state in regard to the payment of board of children committed by the courts to various private institutions?"

"(2) Will you also let me know whether children committed by the courts for improper guardianship are paid for in the same manner as children committed for delinquency?"

TRAVIS, Comptroller.—I am unable to answer the first question. I do not know what the custom is in other counties of the State.

In fact, the question respecting the municipality properly chargeable with the support of children committed by courts pur-

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suant to law is a troublesome one. As I view it, the law is not clear on this point. In enacting the various statutes relative to the commitment of children to institutions, the Legislature appears not to have considered in all cases how, when and by whom "the expense of board, maintenance and education should be paid."

An examination of the adjudged cases indicates that this question has been seldom before the courts. The decision bearing most nearly on this subject is that of *St. Agnes Training School v. County of Erie*, 68 Misc. Rep. 648. The decision of the court in *Matter of Knowack*, 158 N. Y. 482, is of some little assistance because of the classification of children so committed.

Before entering into a discussion of this question in its entirety, it is appropriate that I point out several classes of cases where a decision as to the municipality properly chargeable may be reached with some degree of certainty.

*First.* The State Charities Law, articles 5 to 14 inclusive and 19 to 21 inclusive, relate to certain specified institutions. They contain special provisions of law relative to commitments to such institutions, the cost of support therein, the municipality chargeable therewith and the manner and method of paying claims therefor. It is to be deplored that the Legislature did not observe and enforce some degree of uniformity respecting each of these institutions. It will be noticed, however, that no general plan of procedure or principle respecting the municipality chargeable with the expense is contained in the several articles to which I have referred. Each of these articles contains provisions peculiar only to it. However that may be, if a child be committed to one of the institutions named in the State Charities Law, in the articles to which I have referred, reference should be to the provisions applicable to that institution for the purpose of determining what municipality is chargeable with the support of the child and how payment may be obtained.

*Second.* When children are committed for vagrancy, section 892 of the Criminal Code applies. That section provides that in those counties of the State where the distinction between town or city and county poor obtains the expense of conviction and maintenance during commitment shall be a charge upon the town, city

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or county in which the person committed had a legal settlement at the time of commitment.

*Third.* If a child be committed for truancy, then section 635 of the Education Law applies. Subdivision 9 of that section provides that the expense attending the commitment and the cost of maintenance of any truant residing in any city or district employing a superintendent of schools, shall be chargeable against such city or district, and in all other cases a charge against the county.

*Fourth.* All children committed other than as specified in "First," "Second" and "Third," above, may be grouped in two classes:

(a) Those committed for improper guardianship or for reasons not involving an overt act on their part, which if performed by an adult would constitute a crime; in other words, that class of children who, because of their unfortunate circumstances, must necessarily, for their own good and the benefit of society, be cared for in appropriate institutions.

(b) That class of children committed for wrongful or criminal acts, where it is the policy of the state, by reason of their minority, to commit them to charitable, benevolent or correctional institutions rather than to send them to jails, penitentiaries and state prisons.

Although, as I have already stated, the law is not clear on this subject, I am of the opinion that children falling within the group designated above under "a" should be maintained in institutions at the expense of the poor district which would be chargeable with their support were they found to be poor persons under the Poor Law.

I am also of the opinion that those falling within the group designated by the letter "b" should be supported in the institutions to which they are committed at the expense of the county.

Section 450 of the State Charities Law is important in this connection. Every judge or justice who commits a child to an institution should be familiar with this section. I am satisfied that it imposes upon the judge or justice the duty of ascertaining and determining at the time of commitment the municipality chargeable with the child's support, and that the report required

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to be made by him should clearly indicate his conclusion in this regard.

If in Westchester county the judges and justices are not familiar with section 450 of the State Charities Law, or if they neglect or fail to make the reports therein required, then it is suggested that the board of supervisors have prepared and furnished to each judge or justice within the county appropriate blanks for making such reports. If this be done, it will go a long way toward solving the question presented in this inquiry.

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In the Matter of the Provisions of Law Relative to FEES OF VILLAGE POLICE JUSTICES as Prescribed in Code of Civil Procedure Section 3322, Code of Criminal Procedure Section 848 and the Village Law Sections 185 and 186

(Dated July 1, 1916)

Moneys received by a village police justice for performing a marriage ceremony are gratuities which he may retain as his own.

Section 186 of the Village Law, as amended confers on police justices in villages concurrent jurisdiction with justices of the peace in civil cases. A police justice in receipt of a salary is entitled to retain for his own use the same fees in civil cases which a justice of the peace is entitled to retain.

Frank Bigelow, Esq., Police Justice, Malone, N. Y., submitted a statement of facts and an inquiry based thereon as follows:

"The office of police justice of Malone village is a salaried office and the incumbent thereof is required by the statute to transfer to the village treasurer, all fees, costs or expenses received by him in any action or proceeding.

"Is it the statutory direction that the police justice of said village transfer all fees to the village treasurer, received by him as the result of: (a) the trial of a civil action or proceeding; (b) the fee received for performing a marriage ceremony and (c) association with another justice in the trial of a bastardy case."

TRAVIS, Comptroller.—It seems to be a well-settled principle of law that the right of a public officer to the salary of his office

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as fixed by law, is a right created by law and is incident thereto and not in the nature of a contract nor dependent upon the value of the services actually rendered. Therefore the acceptance of the office and performance of the duties do not create a liability on the part of the municipality. When one accepts a public office or position, the presumption is that it is done with full knowledge of the law as to salary, compensation or fees and the limitation thereof. It has been held that an employee of a municipal corporation at a regular salary is bound to perform the duties of his office for the compensation fixed, even though additional duties are imposed upon him by statute subsequent to his employment. *Supervisors v. Jones*, 119 N. Y. 339; *Matter of Palmer*, 21 App. Div. 180; *May v. Chicago*, 222 Ill. 595; *Hope v. Alton*, 214 id. 102.

It is noted that in the cases cited herein there was no change in the character of the duties imposed by subsequent legislation, whereas in the case now under consideration, the subsequent act of the Legislature amending section 186 of the Village Law, which conferred the same jurisdiction upon a police justice as that of a justice of the peace of a town in all civil actions, contemplated a radical departure from the statutory duties devolving upon a police justice as such. Clearly a distinction should be drawn between the duty now imposed by this amendment and the duty which formerly devolved upon the police justice. Apparently when the amendment to section 186 of the Village Law was enacted, no attempt was made to amend section 185 of the same statute in order to conform to what seemed to be the requirements of section 186. The only portion of section 185 that can be construed to apply to the question under consideration is as follows: "All other fees, costs, expenses, fines or penalties so collected, shall be paid over and accounted for in the same manner as moneys collected by a justice of the peace in like cases."

It will be noted by a further reading of section 185, that in a certain class of cases and proceedings provision is made for the disposition of costs, fees and expenses, penalties, etc., but in the portion quoted, a justice of the peace would retain the fees arising from a civil proceeding. Concurrent jurisdiction with a justice

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of the peace in civil actions now is conferred upon a police justice under the amendment to section 186 and it naturally follows that the same privileges and prerogatives in connection therewith are assumed by the police justice. Therefore, subdivision (a) of the inquiry is answered in the negative in the absence of statutory direction to the contrary and a reasoning by analogy which I believe to be controlling.

I find no statutory requirement that provides that a police justice or other magistrate shall receive a fee for performing a marriage ceremony. It therefore follows that no legal authority exists for exacting a fee for such services and all sums received by him in the performance of this ceremony are in the nature of gratuities. The right to perform the marriage ceremony is conferred upon him by statute and is merely incidental to his jurisdiction. It is optional with the justice as to whether he performs the ceremony upon request or not and this prerogative cannot be construed in any sense as a duty devolving upon him. Subdivision (b) of the above inquiry would therefore be answered in the negative, since the performance of a marriage ceremony does not constitute a part of the duties of the office of police justice, but is merely incidental thereto.

Section 848 of the Code of Criminal Procedure relates to the association of a police justice with another justice in the examination conducted in bastardy cases. The statute provides that a police justice shall receive the same fee, in the trial of actions or conduct of proceedings, either civil or criminal, as a justice of the peace, and section 3322 of the Code of Civil Procedure enumerates the fees to which a justice of the peace is entitled. Authority for receiving a fee in connection with proceedings under section 848 of the Code of Criminal Procedure is contained in said section 3322 of the Code of Civil Procedure.

While it may be within the power of a police justice to decline to sit as a magistrate in proceedings under section 848 of the Code of Criminal Procedure, yet the fact remains that the statutory direction that a fee be paid in the event that he does sit in this capacity would seem to bring this action within the scope of the duties of the office to which he has been elected. This simply

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constitutes an additional duty imposed upon the police justice by statute as contra-distinguished from mere incidental authority as described in answer to subdivision (b) of the inquiry. Subdivision (c) should therefore be answered in the affirmative as all fees received by the police justice under section 848 of the Code of Criminal Procedure should revert to the village treasurer under section 185 of the Village Law.

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In the Matter of Statutory Provisions as to COUNTY AID TO TOWNS AND TEMPORARY LOANS as Provided by the County Law, Sections 12 and 63, and the General Municipal Law, Section 5

(Dated July 7, 1916)

If the board of supervisors of any county deems any town therein to be unreasonably burdened by its expenses for the construction and repair of bridges, the board may cause a sum of money, not exceeding \$2,000 in any one year, to be raised by the county and paid to such town to aid in defraying such expenses.

The authority of counties to borrow money on temporary loan is limited by section 5 of the General Municipal Law.

Hon. Peter R. Cole, County Treasurer, Canandaigua, Ontario county, N. Y., submitted a statement of facts and an inquiry based thereon as follows:

"At a meeting of the board of supervisors of Ontario county, held on the 29th day of June, 1916, a resolution was adopted which provided that pursuant to section 63 of the County Law, the board appropriate and make available immediately the sum of \$6,000 to aid certain towns in the construction and repair of bridges. The preamble to the resolution recites that extensive damage to roads and bridges has been sustained by said towns and that they have been put to heavy expense for repairs to such roads and bridges and that a number of bridges in said towns are in need of immediate repair and that such towns will be unreasonably burdened for the expense of construction and repair to said bridges. The resolution also authorized the county treasurer to



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borrow the whole or any part thereof for or on behalf of the county of Ontario and directs that such amount so borrowed be raised in the next succeeding tax levy of said county.

"May the county treasurer legally borrow the sums required for the purposes above specified in anticipation of the taxes to be levied in the next succeeding fiscal year, that is to say, after October 1, 1916?"

TRAVIS, Comptroller.—Section 63 of the County Law is as follows: "If the board of supervisors of any county shall deem any town in the county to be unreasonably burdened by its expenses for the construction and repair of its bridges, the board may cause a sum of money, not exceeding \$2,000 in any one year, to be raised by the county and paid to such town to aid in defraying such expenses."

It is to be noted that the resolution above referred to was adopted at a meeting of the board of supervisors held in June and not at the annual session. Hence, the attempted levy of the sum of \$6,000 was made at a time not authorized by law. See County Law, § 12, subd. 2.

The authority of counties to borrow on temporary loan is limited by section 5 of the General Municipal Law which is in part as follows: "Moneys shall not be borrowed by a municipal corporation on temporary loan, *except in anticipation of the taxes of the current fiscal year*, and for the purposes for which such taxes are levied." It is therefore my opinion that at this time the county treasurer is without authority to borrow for the purposes mentioned in the resolution referred to.

I desire to call attention to the fact that the preamble of the resolution refers to the extensive damage to "roads and bridges" and that section 63 of the County Law empowers the county to extend aid to towns only for the construction and repair of bridges. The repair of highways is a matter which must be attended to by the towns and for which authority is found under provisions of the Highway Law.

Attention is also called to the fact that under section 138-a of the Town Law, a town board may borrow on the faith and credit of the town, a sum sufficient to pay certain expenses incurred in

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connection with the performance of any duties imposed by statute upon a town and which require immediate action.

Assuming that the town affected proceed under the section last cited, it might then subsequently be within the power of the board of supervisors to contribute aid to the towns under authority of section 63 of the County Law. See *Knowles v. Board of Supervisors, Chemung Co.*, 112 App. Div. 138.

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In the Matter of COMPENSATION OF GRAND AND TRIAL JURORS as  
Provided by the Code of Civil Procedure, Section 3314

(Dated July 13, 1916)

The compensation of grand and trial jurors is prescribed by section 3314 of the Code of Civil Procedure. They are entitled to pay only for each day's actual attendance.

A practice in the county of Ontario has been to pay trial and grand jurors the *per diem* allowance only for such days as the jurors are actually in attendance and not for the days when absent, even when excused by the court. An inquiry was made by Hon. Homer J. Reed, deputy county clerk, Canandaigua, N. Y., as to whether this practice conforms to the law.

TRAVIS, Comptroller.—The compensation of grand and trial jurors is prescribed by section 3314 of the Code of Civil Procedure which is in part as follows:

"In the counties within the city of New York the board of aldermen, and in any other county the board of supervisors, may direct that a sum not exceeding three dollars \* \* \* be allowed to each grand juror, and each trial juror for each day's attendance at a term of court of record, of civil or criminal jurisdiction, held within their county. \* \* \*.

"The sum so established or allowed must be paid by the county treasurer upon the certificate of the clerk of the court, stating the number of days that the juror *actually* attended."

In view of the foregoing, I am of the opinion that the practice referred to is correct and that jurors are entitled to compensation only for the days of actual attendance.

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**In the Matter of the PROVISIONS OF LAW RELATIVE TO THE OFFICE  
OF POLICE JUSTICE in the Village of Camillus — Fees and the  
Disposition of Fines**

(Dated July 13, 1916)

Code of Criminal Procedure, sections 726 and 727, Town Law, section 171,  
Village Law, sections 47, 181, 182 and 184.

A village police justice, not salaried, is entitled to be paid for his service the same fees as a justice of the peace for like services, to be paid in like manner, except that his fees in proceedings on account of violations of village ordinances shall be paid by the village.

Francis Preston, Esq., Syracuse, N. Y., submitted an inquiry as follows:

"In a communication in which reference is made to chapter 477 of the Laws of 1866 as authority for the establishment of the office of police justice in the village of Camillus, N. Y., the following questions are asked:

"*First.* Who is the proper officer to receive the money collected on fines imposed by the magistrate of the village of Camillus, N. Y., for crimes committed within the village boundary?

"*Second.* Also, how the expense is apportioned where crimes are committed outside of the village and also where they are committed inside the boundary line of the village, as for instance, do the village and town pay the expense where the crime was committed outside the village?"

TRAVIS, Comptroller.— The village of Camillus appears to have been incorporated in 1852, presumably under authority of chapter 426 of the Laws of 1847. This chapter was entitled "An Act to provide for the incorporation of villages." It was passed December 7, 1847, and was the first general law relating to villages passed by the Legislature of New York State. Chapter 477 of the Laws of 1866, referred to in the inquiry, was entitled, "An Act to amend the act to provide for the incorporation of villages passed December 7, 1847, so far as relates to the village of Camillus, in the County of Onondaga." It was, therefore, an amendment to the general statute of 1847 and was repealed by the passage of chapter

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414 of the Laws of 1897. The act last mentioned was a revision of the laws relating to villages and contains the following:

"§ 341. The following villages are subject to the provisions of this chapter, as if incorporated thereunder:

"1. Villages incorporated under chapter 426 of the laws of 1847, or the acts amendatory thereof and supplemental thereto, and which have not been re-incorporated under a special law."

Section 341 last above cited was re-enacted in the Consolidated Laws and is now section 381 of the Village Law.

In view of the foregoing, I am of the opinion that the powers and duties of the police justice of the village of Camillus are defined by the provisions of the Village Law. The following sections of that statute are pertinent to this inquiry.

Section 47 continues the office of police justice in every village in which it formerly existed. Section 182 provides that the police justice may hold a Court of Special Sessions. Section 184 provides that if the police justice be not paid a salary he shall be entitled to receive for his services the same fees as a justice of the peace for like services, *to be paid in like manner*, except that his fees in proceedings on account of violations of village ordinances shall be paid by the village.

Sections 726 and 727 of the Code of Criminal Procedure prescribe that fines imposed by Courts of Special Sessions shall be paid to the supervisor of the town in and for which such courts are held.

Although section 181 of the Village Law provides that penalties imposed by *justices of the peace* for violations of village ordinances shall be paid to the village treasurer, it is silent as to the disposition of such fines when imposed by the police justice. It is a fair inference, however, that the same rule applies in both instances.

I assume that the police justice referred to is not in receipt of a salary and am of the opinion that, except in case of violations of village ordinances, his fees are chargeable to the town or county and fines collected are payable to the supervisor of the town. His fees for the trial of violations of village ordinances are payable by the village and fines imposed belong to the village.

In answer to the second inquiry above, it should be noted that

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the police justice has no jurisdiction to try offenses committed "outside" the village. The criminal expenses of the justices of the peace in the town, including the police justice, of the village are:

(1) Town charges in cases in which the court has jurisdiction to try.

(2) Otherwise county charges. See Town Law, § 171.

Town charges are audited by the town board or board of town auditors, reported to the board of supervisors and levied against all the property in the town.

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In the Matter of the Provisions of the HEALTH LAW, SECTIONS 21 AND 25, and of the SANITARY CODE, CHAPTER 2, as to Quarantine Expense

(Dated July 21, 1916)

Inquiry as to how the expenses of a person who becomes indigent through quarantine are to be met.

If a person, not a pauper or indigent, becomes indigent as a result of quarantine by the health authorities, all expenses for care and maintenance are chargeable against the health district in which he is quarantined.

John R. Slawson, Middletown, N. Y., submitted a statement of facts and an inquiry based thereon as follows:

"During the winter of 1915-1916 an epidemic of diphtheria became prevalent in Middletown, N. Y., and the cause was attributed to diphtheria carriers who were employees on farms supplying milk to the said city. One of these carriers was employed on a farm located in the town of Wallkill, and was quarantined for several weeks as a result of the order of the health officer of that town. The employer of the said carrier presented a bill for board and washing for said employee during the time he was quarantined.

"Is the town liable for the payment of such bill herein referred to provided it represents a reasonable charge for the services rendered?"

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TRAVIS, Comptroller.—Section 21 of the Public Health Law defines the general powers and duties of local boards of health and among other provisions states that every such local board, subject to the provisions of the Public Health Law and of the Sanitary Code, shall prescribe the duties and powers of the local health officer, who shall be its chief executive officer, direct him in the performance of his duties, and fix his compensation, etc. It is therefore presumed that the health officer in the case in question was acting within the scope of his authority and under the direction, either express or implied, of the local board of health.

Section 25 of the Public Health Law relates to infectious and contagious or communicable diseases and states in part that every local board of health and every health officer shall guard against the introduction of such infectious and contagious or communicable diseases as are designated in the Sanitary Code, by the exercise of proper and vigilant medical inspection and control of all persons and things infected with or exposed to such diseases, and provide suitable places for the treatment and care of sick persons who cannot otherwise be provided for. It is therefore apparent that the health officer in the case presented herein was acting within the scope of his authority in thus isolating the person reputed to be a carrier of diphtheria germs.

In chapter 2 of the Sanitary Code, the so-called communicable diseases are designated and in this list the disease herein referred to, namely diphtheria, is enumerated.

Section 35 of the Public Health Law provides as follows: "All expenses incurred by any local board of health in the performance of the duties, imposed upon it or its members by law, shall be a charge upon the municipality, and shall be audited, levied, collected and paid in the same manner as the other charges of, or upon, the municipality are audited, levied, collected and paid. The taxable property of any incorporated village shall not be subject to taxation for maintaining any town board of health, or for any expenditure authorized by the town board, but the costs and expenditures of the town board shall be assessed and collected exclusively on the property of the town outside of any such village."

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The premise is assumed that the person quarantined in this instance was self-supporting prior to the quarantine, and that by reason of the quarantine he became indigent. In the absence of this assumption that the person afflicted became a public charge by reason of such affliction, no question would arise as a quarantine would not relieve any individual from meeting his obligations for food, clothing and medical attendance if he were personally able to defray such expenses. It therefore follows that if a person not a pauper or indigent person and not receiving relief from the town or county becomes indigent as a result of quarantine by the health authorities, all expenses for medical care and maintenance are chargeable against the health district in which such person is quarantined. In other words, if he be in a village and quarantined by the board of health of the village, that such expenses are chargeable against the village. If the person quarantined be in a town containing a village or a city having a board of health, such expenses heretofore referred to are chargeable against the territory only over which the board of health exercises jurisdiction. If the person be quarantined in a consolidated health district such as is described in section 20 of the Public Health Law, then all expenses heretofore referred to are chargeable against the consolidated health district, that being the territory over which the health authorities exercise jurisdiction.

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In the Matter of the Provisions of Law as to the APPORTIONMENT  
OF EXPENSES OF MAINTAINING AND ENFORCING QUARANTINE  
REGULATIONS

(Dated July 21, 1916)

General answer in response to numerous inquiries promulgated by the Comptroller, the Attorney-General and the State Commissioner of Health.

So numerous have been the inquiries as regards the cost of maintenance of paupers quarantined in three classes of cases, and also in the case of a person who becomes indigent as the result of a quarantine, that the five statements as to meeting such maintenance have been determined by the three said departments.

TRAVIS, Comptroller.— (1) If a *pauper* or indigent person living in a village, receiving assistance from the poor authorities of

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the town or county, is quarantined by the health authorities, all expenses incurred by them in the performance of the duties imposed upon them by law are chargeable against the village.

(2) If a *pauper* or indigent person living in a town containing a village or city having a local board of health, receiving relief from the poor authorities of the town or county, is quarantined by the health authorities, all expenses incurred by them in the performance of the duties imposed upon them by law are chargeable against the health district — meaning that part of the town outside of villages and cities having boards of health of their own — over which they exercise jurisdiction.

(3) If a *pauper* or indigent person living in a town not containing a city or village, receiving relief from the poor authorities of the town or county, is quarantined by the health authorities, all expenses incurred by them in the performance of the duties imposed upon them by law are chargeable against the health district.

(4) In the three instances cited above, the person quarantined being a *pauper* or indigent person before the quarantine was imposed, it remains the duty of the poor authorities to provide for the maintenance and support of such persons, as required by the Poor Law, necessary services, such as rent, fuel, light, food, clothing and medical attendance, in the same manner and to the same extent as though the quarantine had not been imposed.

(5) If a person, not a *pauper* or indigent person, and not receiving relief from the town or county, becomes indigent as the result of quarantine by the health authorities, all expenses for medical care and maintenance are chargeable against the health district in which he is quarantined.

This means, if he be in a village and quarantined by the board of health of the village, that such expenses are chargeable against the village. If he be in a town containing a village or city having a board of health, such expenses are chargeable against the territory only over which the board of health exercises jurisdiction. If he be in a consolidated health district, such as is described in section 20 of the Public Health Law, then all expenses are chargeable against the consolidated health district, that being the territory over which the health authorities exercise jurisdiction.



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In the Matter of the Provisions of the PUBLIC OFFICERS LAW, SECTION 67 and of the TOWN LAW, SECTIONS 85, 87, 133 and 175 as to Fees of Town Clerk

(Dated July 31, 1916)

**Claim of town clerk analyzed and legality of items discussed.**

Some seventeen inquiries have been submitted to the Comptroller as to the legal fees in certain specific cases. Discussion of said cases in detail.

Frederick Davis, town clerk, Stone Ridge, N. Y., submitted inquiries as to the legal fees in the following cases.

"What are the legal fees for

"1. Filing bills against the town?

"2. Filing bonds of town officers?

"3. Filing oaths of town officers?

"4. Filing election expenses of candidates for town offices?

"5. Filing supervisors' vouchers?

"6. Filing bills paid by the overseer of the poor?

"7. Entering bills paid by the overseer of the poor?

"8. Filing poll books and election officers' returns?

"9. Giving notice to members of the town board of a meeting of the town board?

"10. Sorting papers delivered by a predecessor clerk?

"11. Receiving school trustees' reports?

"12. Delivering school registers to district trustees?

"13. Delivering trustees' reports to the district superintendent of schools?

"14. Filing school trustees' orders on supervisors?

"15. Delivering tax roll to supervisors?

"16. Traveling to the county seat on official business?

"17. Under the provisions of section 133 of the Town Law, how may a town clerk be reimbursed for express charges paid by him for the purchase of supplies for his office?"

TRAVIS, Comptroller.—I understand it to be the law of this State that a public officer is entitled to no compensation for the

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performance of a public service unless the law specifically attaches it to his office. *Fitzsimmons v. City of Brooklyn*, 102 N. Y. 536. It was held in the *Matter of the Town of Hempstead*, 36 App. Div. 321, to be incumbent upon the person making a charge against the town to make plain that such charge is in all respects a legal one and authorized by some law. It is, therefore, incumbent upon a town clerk who is desirous of charging for the services suggested by the foregoing inquiries to be able to point out the statute authorizing the charge to be made against a town and fixing the compensation or fee to be charged or allowed therefor.

The 1st paragraph in section 67 of the Public Officers Law reads as follows: "Each public officer upon whom a duty is expressly imposed by law *must execute the same without fee or reward excepting where a fee or other compensation therefor is expressly allowed by law.*"

Section 87 of the Town Law reads as follows: "No town officer shall be allowed any per diem compensation for his services unless expressly provided by law." I can find no provision of law and have been referred to none which expressly or by necessary implication fixes a fee to be allowed and paid to a town clerk by the town for any of the services specified in the several inquiries under consideration.

Section 85 of the Town Law, in so far as it is applicable to the office of town clerk, provides that he shall be entitled to compensation at the rate of two dollars "for each day actually and necessarily devoted" by him "to the service of the town in the duties" of his office "when no fee is allowed by law for the service."

It appears from the letter of the town clerk that the board of supervisors of Ulster county, the county in which the town of Marbletown is contained, acting under paragraph b of subdivision 1 of section 85 of the Town Law, as amended in 1915, did by resolution fix the compensation of various officers of the town, of which the town clerk is one, at three dollars per day. Therefore, there being no specific fees provided by law to be paid the town clerk for services now under consideration, I conclude that the town clerk is entitled to charge against and receive from the town compensation at the rate of three dollars per day for the services

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mentioned in inquiries 1, 2, 3, 5, 6, 7, 9, 10 and 15, they being services performed for his town within the duties of his office.

I do not mean to hold that the town clerk may charge the town three dollars for a complete day's service when the only work performed was the filing of a single paper or of a few papers, which required but a fractional part of a day's service.

The town clerk should, as required by section 175 of the Town Law, itemize his claim by showing the date upon which each service was rendered, of what it consisted and the amount of time consumed, and the amount charged therefor. If this be done, the auditing body will have before it the information upon which to determine whether the work was performed in the "service of the town," whether it pertained to the duties of his office and whether the amount of time charged was actually and necessarily consumed in the performance of the work.

The services indicated by inquiries 4 and 8 are required of a town clerk pursuant to the provisions of the Election Law. Section 319 of that act, in so far as it is pertinent to this inquiry, reads as follows: "The town clerk of each town shall be paid by such town a reasonable compensation for his services in carrying out the provisions of this chapter, to be fixed by the other members of the town board of the town." I therefore conclude that the allowance made to the town clerk for services in election matters covers the work performed by him as suggested by inquiries 4 and 8.

Concerning inquiries 11, 12, 13 and 14, it may be said that article 12 of the Education Law requires a town clerk to perform these services along with various other duties, and section 341 of that act provides that the necessary expenses and disbursements of the town clerk incurred in the performance of the duties specified in article 12 are town charges and shall be audited and paid as such. I am of the opinion that for the time consumed in performing the services enumerated in inquiries 11, 12, 13 and 14 and the other services required by article 12 of the Education Law, a town clerk is entitled to no fee or other compensation, for, as we have seen, he is entitled to charge per diem compensation only for work performed in "the service of the town" as well as in the duties of

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his office. Town Law, § 85. In other words, two elements must be present: the work must have been performed in connection with the duties of his office, and, also, in "the service of the town." The business of public education is a State function; therefore, when performing duties under the Education Law, a town clerk cannot be said to be working in the service of the town. He is working in the services of the State or of the school district or of both. As indicated above, whatever expenses are actually and necessarily incurred by him in the performance of such duties under the Education Law are by law made town charges and should be reimbursed to him.

Inquiry No. 16 is not sufficiently definite to enable me to express an opinion concerning it. There may be and probably are instances where it is necessary for the town clerk to visit the office of the county clerk on official business. However, none such now occur to my mind. It is suggested that the town clerk submit more specific information respecting this inquiry.

As to inquiry No. 17, it is my opinion that, notwithstanding the provisions of section 133 of the Town Law, the town clerk may lawfully present a claim for audit and that the town board may audit and allow the same, containing charges for express packages sent to him in his official capacity, upon which the charges are not prepaid, and for office supplies purchased and paid for by him, where such supplies are proper charges against the town. This holding, I believe, is supported by the intention of the Legislature as expressed in subdivision 2 of section 170 of the Town Law, which sanctions, at least in some instances, the payment of such expenses by the town, and seems to imply that the town clerk may present claims therefor. It should be expressly understood, however, that the town clerk is not necessarily entitled to have all of the expenses of his office paid by the town. As I read the Hempstead decision, cited above, it is held that in the absence of an express statute to the contrary an officer who is compensated at a per diem rate or by fees must furnish himself with suitable stationery, blanks, etc., and that the per diem compensation and fees allowed by law are expected to be sufficient to pay for them.

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**In the Matter of the Provisions of the HIGHWAY LAW, SECTIONS  
45 and 47 as to Town Charges**

(Dated August 10, 1916)

**A town board audit is authorized to determine the necessity for the purchase of a town automobile.**

Whether or not a town board may legally authorize the purchase and maintenance of an automobile for the use of a town superintendent of highways is a question depending largely on local conditions. The nature of the superintendent's duties requires him to travel throughout his town, and the town board ought to exercise such judgment as will be for the town's best interest.

Arthur W. Jones, Port Washington, N. Y., submitted a statement of facts and an inquiry based thereon as follows:

"The town board of the town of North Hempstead adopted a resolution that it was necessary for the best interests of the town to permit the town superintendent of highways to purchase an automobile for use in his official capacity.

"In this town the power to audit claims and accounts against the town is vested in the board of town auditors. The following inquiry is submitted by that body:

"Is the purchase price of an automobile, for the use of a town superintendent of highways, a proper town charge?"

TRAVIS, Comptroller.—The duties of a town superintendent of highways are set forth in section 47 of the Highway Law. From their nature, it is evident that this official must necessarily travel about the town in the exercise of those duties.

Section 45 of the Highway Law authorizes the town board to fix the compensation of the town superintendent and his deputy, if any, and respecting their expenses reads as follows: "Such town superintendent and his deputy, if any, shall be paid the actual and necessary expenses incurred by them in the performance of their duties."

The Honorable Attorney-General, in an opinion recently ren-

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dered, held that the town board could not lawfully allow a town superintendent or his deputy, or both, a fixed sum in lieu of expenses, nor pay him or them for the use of his or their own vehicles, nor allow a fixed rate of mileage if automobiles owned by them were used as a means of conveyance; in other words, that there could be allowed only the actual and not constructive or estimated expenses incurred by such officials. As has been seen, the nature of the duties required to be performed by a town superintendent of highways compels him to travel extensively about the town. The effect of the Attorney-General's opinion is that he must hire vehicles, either those drawn by horses or propelled by motors.

Conditions vary greatly in the several towns of the state. The extent to which a town superintendent of highways will be required to travel depends, almost entirely, upon local conditions; upon the number of miles of highway in his town; the amount of money appropriated to be expended; the number of men employed on the highways; the points at which they are employed, and, perhaps, the character and nature of the work being done. It may, and probably will, develop that in some of the smaller towns of the State where, because of local conditions, the town superintendent of highways is not required to travel much, the interests of the town will best be served by his hiring a horse-drawn vehicle. Perhaps, in the larger towns of the State, this mode of conveyance would prove to be inadequate; that the interests of the town can best be served by hiring an automobile, that is to say, if it is necessary that the town superintendent cover a great number of miles daily, or that his presence is required at different points within the town on the same day, the town will obtain more efficient service on his part by furnishing him with a conveyance which will enable him to travel rapidly from one point of employment to another. Again, it may develop in some of the towns where the town superintendent is almost daily called upon to cover a considerable mileage or to travel rapidly between various points on the highways, that the expense to the town of hiring an automobile for his use would be greater than the expense incurred if an automobile should be furnished and maintained by the town for his use.

Section 45 of the Highway Law does not specify the nature of

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expenses to be incurred by the town superintendent of highways. It does not require him to travel about in a vehicle drawn by horses; it does not require that he use or refrain from using an automobile. It does not, as I view it, tie the hands of the town superintendent or the town board, respecting the nature of the expenses, except that they must be "actual and necessary." If it develop to be in the interest of economy that an automobile should be furnished and maintained for the use of the town superintendent of highways, then I deem the expense of purchasing an automobile and maintaining it for his use an "actual and necessary" expense within the meaning of that term as used in section 45 of the Highway Law. In fact, if it develop that it would be more expensive to hire an automobile or to hire a vehicle drawn by horses than to purchase and maintain an automobile for the use of the town superintendent, then I do not see how it could be argued that the expense of hiring the automobile or vehicle was necessary. Stated differently, I conceive section 45 of the Highway Law to provide for the payment by the town of the actual and necessary expense of the town superintendent of highways in the manner most economical for the town, taking into consideration all of the facts.

From what has been said, it will readily be inferred that it is my opinion that the authority of the town board and town superintendent of highways to purchase an automobile for his use, is, in each town, a question of fact, one dependent upon local conditions; that in one town, the purchase and maintenance of an automobile may be "actual and necessary" expenses, while in another town, they are not.

I am, therefore, of the opinion that the purchase and maintenance of an automobile for the use of the town superintendent of highways is a proper town charge where it develops to be for the financial interest of the town. In all other cases, such expense is not properly chargeable against the town.

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In the Matter of the Provisions of the TAX LAW, SECTIONS 3 and 4, Laws of 1885, Chapter 433, in Relation to the Bridge at Scotia, Schenectady County, N. Y.

(Dated August 21, 1916)

**Repeal of exemption clauses in a statute by implication.**

Chapter 433 of the Laws of 1885, as amended by chapter 237 of the Laws of 1892, provides that a certain bridge owned by the town of Glenville, Schenectady county, N. Y., and connecting the village of Scotia and the city of Schenectady, "shall not be liable to taxation for any purposes whatever except state and county taxes." This provision is believed to have been repealed by implication by the passage of the Tax Law (Laws of 1896, chap. 908).

W. R. Williams, supervisor, town of Glenville, Scotia, N. Y., submitted a statement of facts and an inquiry based thereon as follows:

"By chapter 433 of the Laws of 1885, the management and control of a certain bridge, crossing the Mohawk river between the city of Schenectady and the town of Glenville and owned by the town of Glenville, was vested in the board of auditors of the town of Glenville. One-half of the bridge structure lies within the corporate limits of the city of Schenectady and one-half within the limits of the town of Glenville.

"The statute has not been expressly repealed or amended, except that by chapter 237 of the Laws of 1892, section 7 was amended to read as follows: 'The said bridges shall be free for the use of the residents and taxpayers of the said town of Glenville, and said bridges shall not be liable to taxation for any purposes whatever except state and county taxes.'

"Has the provision of section 7, cited above, exempting the said bridge from taxation (except for state and county taxes) been impliedly repealed by the passage of the Tax Law?"

TRAVIS, Comptroller.—A revision and consolidation of the tax laws of the State was undertaken and passed by the Legislature of 1896. Laws of 1896, chapter 908. The action of the Legislature



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followed a report of Commissioners of Statutory Revision in which it was stated that there has been no revision of the tax laws since the Revised Statutes of 1828, and that about 100 supplemental acts had since been passed, including many which increased "*the exemptions of property from taxation.*"

With this fact clearly brought to its attention, the Legislature promulgated rules for taxation and exemption of property. These rules are now found in sections 3 and 4 of the Tax Law, and are, in part, as follows:

"Section 3. All real property within this state, and all personal property situated or owned within this state, is taxable unless exempt from taxation by law.

"Section 4. The following property shall be exempt from taxation:

"Sub. 3. Property of a municipal corporation of the state held for a public use \* \* \* except that portion of municipal property not within the corporation."

In the case of *Pratt Institute v. City of New York*, the court, reviewing the effect of chapter 908 of the Laws of 1896, said: "A general rule of taxation and exemption was laid down after the revisers, as they expressly declared, had gone over the entire field of statutory law relating to the subject. It was the apparent purpose of this legislation to define the status *with reference to taxation or exemption* from taxation of every parcel of real property and every article of personal property in the state. It furnished a plain and simple rule for all assessors by which they could at once determine whether property within their districts was subject to taxation or not, without searching the statutes for nearly seventy years for special exemptions. It is a codifying act, designed to reduce all statutes relating to taxation into a complete and harmonious system. A codifying act is presumed to exhaust the subject to which it relates, unless a different intention appears on the face of the statute, or is an irresistible inference from special circumstances. The new enactment is substituted in the place of all statutes previously existing and becomes the sole rule of action." To the same effect, see *Matter of Huntington*, 168 N. Y. 399, and *Peterson v. Martino*, 210 id. 412.

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In the *Martino* case, Mr. Justice Cardozo stated, at page 418, certain well established rules of statutory construction, as follows: "It is the law, declared on many occasions by this court, that a repeal by implication is not favored, and that it will be upheld only where the repugnancy is plain and unavoidable. It is also the law that a statute, applicable to a particular class of cases, is not repealed by a general statute, broad enough in terms to embrace the cases covered by the special law, unless the intent to work a repeal is manifest. Such an intent, however, must commonly be held to be manifest where the later statute is intended as a revision or codification of earlier enactments. In such cases, the very purpose of the later legislation is to substitute uniformity for diversity. This fundamental purpose will be upheld, even though the earlier statutes are not mentioned in the schedule of laws repealed."

He then comments respecting the case under consideration, and says: "We have little occasion for surprise that the legislature omitted to unearth that statute from the mass of later legislation which buried and concealed it."

Again, in stating the purpose of the Tax Law, he says: "The very purpose of the Tax Law was to supplant the earlier statutes which had become so numerous and confusing that they could with difficulty be collated. To this end it declared a comprehensive system, which superseded the scattered and fragmentary laws that preceded it. We think it important that this view of its operation be maintained."

As will be seen from the foregoing, the fact that the Glenville special act was not mentioned or enumerated in the schedule of laws repealed by the Tax Law is not material and has no bearing on the subject. No attempt was made by the Legislature to collate the numerous special acts affected.

I, therefore, conclude that the provision of section 7 of chapter 237 of the Laws of 1892, exempting the said bridge from taxation was repealed by implication by the enactment of the Tax Law in 1896, and that the portion of said bridge within the corporate limits of the city of Schenectady is taxable for the fire tax and for other city purposes.

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**In the Matter of the Provisions of the PUBLIC HEALTH LAW, SECTION 35, and of the VILLAGE LAW, SECTIONS 101, 101-a and 128 in Relation to Extraordinary Expenses of Board of Health**

(Dated August 28, 1916)

Villages have no inherent power to borrow, and the authority expressly granted is limited by said section 128 of the Village Law.

Notwithstanding the debt limitations in the Village Law, expenses necessarily incurred by a board of health in suppressing an epidemic are legal obligations of the village.

Expenses so incurred may be paid from any surplus existing in village funds, or, if there be no surplus available, an amount necessary to pay the same may be included in and raised under authority of subdivision 2 of section 110 of the Village Law.

Hon. Chester O. Ketcham, village superintendent, Babylon, N. Y., submitted a statement of facts and an inquiry based thereon as follows:

"The village of Babylon, a village operating under the General Village Law, has, by reason of the epidemic of infantile paralysis, incurred extraordinary expenses in suppressing that disease and in preventing it from spreading. No provision for such extra expense was made in the village budget.

"(1) Can the village lawfully incur expenses, in excess of the amount appropriated therefor, for the purpose of executing the duties imposed upon the village board of health by the Public Health Law?

"(2) How may funds be provided to meet such expenses, if they can be lawfully incurred?"

TRAVIS, Comptroller.—Respecting the first inquiry, section 128 of the Village Law provides, in part, as follows: "No contract shall be made involving an expenditure by the village unless the money therefor has previously been estimated by the board of trustees as necessary to be raised during the then fiscal year." Were this the only law on the subject, the answer to the first inquiry would be in the negative.

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Section 35 of the Public Health Law, in so far as it is applicable to this subject, reads as follows: "All expenses incurred by any local board of health in the performance of the duties imposed upon it or its members by law shall be a charge upon the municipality and shall be audited, levied, collected and paid in the same manner as the other expenses of, or upon, the municipality are audited, levied, collected and paid."

This is not a new provision of law. It has been in the Public Health Law, in substantially the same phraseology, since 1885. See Laws of 1885, chap. 270, § 10.

Mr. Justice O'Brien, in writing the opinion in *Matter of Taxpayers of Plattsburgh*, 157 N. Y. 78, said, after quoting the above language: "This provision of the general law must be regarded as in the nature of an amendment, or, at least, a part, of all municipal charters." He then referred to the fact that the charter of the village of Plattsburgh contained limitations upon the power of the board of trustees to raise money by tax or to contract debts. The limitations in the Plattsburgh charter were, in all essential respects, similar to those contained in section 101 of the Village Law. In the Plattsburgh case, it appeared that a succeeding board of trustees audited and directed payment of claims incurred during a previous fiscal year, in excess of the limitations contained in the charter, amounting to approximately \$11,000. In commenting on this situation, the learned justice said: "About one-half of this debt was due to the prevalence of an epidemic in the village, which the local board of health undertook to suppress. The health board directed the trustees to quarantine certain persons and places supposed to be infected and dangerous to the community and they, or the board itself, undertook to do it and thus contracted the debts, claims or obligations already mentioned, and which they subsequently audited. I do not think the audit of these claims constitutes illegal action on the part of the trustees."

Stated differently, the decision in the Plattsburgh case is authority for the proposition that the village board, acting in its capacity of village health board, can, in the lawful exercise of its duties, contract debts, claims or obligations in excess of the appropriation contained in the village budget and in excess of funds otherwise

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available in the village treasury during a given year. I, therefore, answer the first inquiry in the affirmative.

The second inquiry cannot be answered as satisfactorily for the village authorities. That a municipal corporation has no inherent power to borrow money is an undisputed legal rule; therefore, if the village of Babylon, or any other village, desires to borrow money on temporary loan, or otherwise, it must base such loan upon some authority conferred in the statute. The only provision of the Village Law applicable is that contained in the last paragraph of section 128. It reads as follows: "Money may be borrowed in anticipation of taxes levied or to be levied for the current fiscal year but not in excess of the amount previously estimated by the board of trustees, as necessary to be raised during said fiscal year, nor in excess of the amount of taxes of said fiscal year remaining unpaid at the time such money is borrowed, and the money so borrowed must be payable within said year."

It is, therefore, evident that the village may not lawfully obtain the needed funds in this case by the issuance of a temporary loan.

The Legislature of 1916, by chapter 52 of the Laws of that year, added section 101-a to the Village Law. It reads as follows: "If there shall be outstanding no obligations of the village on account of a particular department and if after the payment of the current expenses of such department there shall remain a surplus in the fund of that department such surplus may be applied to the payment of any existing obligation of the village or transferred to the general fund."

This provision of law may relieve the situation in the village of Babylon. If a surplus now exists in one or more of the village funds, or if, at any time during the year, it develops that all of the moneys provided for a given fund are not needed for the purposes of that fund, it is within the power of the village board to apply such surplus to the payment of claims incurred in enforcing the provisions of the Public Health Law. If no such surplus now exists and none develops, the health board may, nevertheless, incur debts and obligations, binding upon the village, and the sum

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necessary to pay the same may be included in and raised as a part of the fund provided by subdivision 2 of section 110 of the Village Law in the next succeeding tax levy.

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In the Matter of the Provisions of the CODE OF CIVIL PROCEDURE, SECTION 3311, CODE OF CRIMINAL PROCEDURE, SECTIONS 616 and 617, 773 to 790 and the COUNTY LAW, SECTION 194, as to Fees or Compensation of Coroners, Witnesses and Stenographers

(Dated August 31, 1916)

Witnesses attending an inquest under subpoena from a coroner are not entitled to witness fees.

In the cases where a coroner is paid in fees he may whenever necessary employ a stenographer, whose compensation becomes a county charge.

Arthur L. Cooke, district attorney, Monticello, N. Y., submitted a statement of facts and an inquiry based thereon as follows:

"A coroner holding an inquest at a county seat subpoenas witnesses who demand compensation or fees for attendance.

"The coroner employed a stenographer to take the minutes at the inquest.

"(1) What fees, if any, are allowed the witnesses?

"(2) What rate of compensation may be allowed the stenographer?"

TRAVIS, Comptroller.—Respecting the first inquiry it may be said that a coroner is a county officer whose duties, with minor exceptions, relate to the enforcement of the criminal law, and whose powers and authority in that respect are defined by title I of part VI of the Code of Criminal Procedure (sections 773–790 inclusive). Unless in receipt of a salary, his compensation is in the form of fees in the amounts prescribed by section 192 of the County Law.

Section 775 of the Code of Criminal Procedure authorizes a coroner to issue subpoenas for witnesses "returnable forthwith, at such time and place as he may appoint."

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Section 776 of the same Code prescribes that "A witness served with a subpoena may be compelled to attend and testify, or punished by the coroner for disobedience, as upon a subpoena issued by a magistrate, as provided in this code."

There is nothing in the Code of Criminal Procedure providing fees for witnesses subpoenaed by a coroner.

Sections 616 and 617 of the Criminal Code permit payment to witnesses in criminal actions in "courts of record," and, consequently, cannot be authority for the payment of fees to witnesses testifying before a coroner.

In view of the foregoing, I am of opinion that in the absence of statutory authority, no fees can be paid to witnesses subpoenaed to testify at a coroner's inquest.

It may be that the coroner was without authority to send his subpoena into an adjoining county and enforce obedience thereto since section 618 of the Criminal Code provides that no person is obliged to attend as a witness out of the county of his residence, unless certain requirements therein prescribed are complied with. If, in this case, the coroner exceeded his authority, the attendance of the witnesses was voluntary and this fact would supply an additional reason for believing that no fee is payable.

It is also possible that if the district attorney believed the testimony of the witnesses material, and, at a time when the grand jury was not in session, desired to secure the testimony of such witnesses, he might pay the expense of bringing them before the coroner and be reimbursed therefor under authority of subdivision 2 of section 240 of the County Law.

The second inquiry is answered by reference to section 194 of the County Law, as amended by chapter 158 of the Laws of 1910, which is as follows: "A coroner shall have power, when necessary \* \* \* in counties where coroners are paid in fees, to employ a stenographer to take and reduce to writing the testimony of witnesses examined before the coroner, the compensation therefor to be a county charge."

No section of the statute prescribes or limits the fee to be paid the stenographer, but, since the statute makes the compensation

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a county charge, his bill can be paid only after audit and allowance by the board of supervisors. The board has authority to determine the reasonableness of the charge, and in the exercise of its authority might reduce, although not wholly disallow, the bill as rendered.

Section 3311 of the Code of Civil Procedure does not apply since by its terms it is limited to "notes of the testimony, or any other proceeding, taken in an action or a special proceeding *in a court of record, or before a judge or justice thereof.*"

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In the Matter of the Provisions of the CODE OF CIVIL PROCEDURE,  
SECTION 3304, and of the EDUCATION LAW, SECTIONS 276, 340  
and 395

(Dated September 18, 1916)

**The reports of school trustees and fees for filing same.**

A county clerk is not entitled to a filing fee for the deposit in his office of school trustees' reports. The county clerk's office is presumably a safe depository for the preservation of reports, abstracts and records.

Arthur E. Belden, district superintendent of schools, Newark Valley, N. Y., submitted a statement of facts and an inquiry based thereon as follows:

"The district superintendent of schools of the first supervisory district of Tioga county, N. Y., pursuant to statute, deposited with the county clerk of Tioga county the annual reports of the various school trustees within his supervisory district, together with an abstract made from such reports.

"Can the county clerk require the district superintendent of schools to pay a filing fee for this service?"

TRAVIS, Comptroller.—Section 276 of the Education Law provides that each school district trustee shall make and file with the town clerk of the town in which his school district is located, an annual report covering the various transactions of his office for the preceding year.

Section 340, paragraph 4, of the same statute, relative to duties



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of town clerks, provides that the town clerk shall require the trustees of school districts to make and deposit with him such reports.

Section 395, paragraph 14, of the same statute provides in part that it shall be one of the duties of the district superintendent of schools to procure the reports of the trustees of school districts from the town clerk's office, make an abstract therefrom, and *deposit* them together with a copy of his abstract in the office of the county clerk.

Section 3304 of the Code of Civil Procedure enumerates "fees of county clerks generally." It is assumed that the county clerk of the county herein referred to bases his claim for a fee on the paragraph of this section which reads as follows: "For filing any paper deposited with him for safe keeping six cents; and for searching for such paper when required, three cents for each paper necessarily opened and examined."

"File" as defined by Webster's Dictionary in so far as the receiving officer is involved, consists of placing a paper or instrument on file among the records of his office by receiving and properly indorsing, entering or the like. His indorsements, etc., constitute evidence of the act and time of filing.

Filing a paper, in modern usage, consists in placing it in the custody of the proper official by the party charged with the duty and making of the proper indorsement by the officer. Bouvier's Law Dictionary.

In the sense of a statute requiring the filing of a paper or document, it is filed when delivered to and received by the proper officer to be kept on file. The word carries with it the idea of permanent preservation of the thing so delivered and received, that it may become a part of the public record. It is not synonymous with deposit. *People v. Peck*, 67 Hun, 560; 22 N. Y. Supp. 576.

I am therefore of the opinion that it is not the purport of the statute as outlined in subdivision 14 of section 395 of the Education Law, to permit the county clerk to charge a filing fee for the *deposit* of the trustees' reports and the abstract of the district superintendent of schools made therefrom. On the contrary, it would appear that the county clerk is required to perform no

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further duty than that of mere custodian for safe keeping of the reports and abstract herein referred to. The county clerk is not required to indorse the reports or record the receipt thereof in a book kept for that purpose. Neither is he required to record in any way the time of such deposit or by whom made.

The theory on which this statute is apparently predicated is that the county clerk's office presumably is a safe depository for the preservation of reports, abstracts and records, and in the absence of other public places of a similar nature, the statute has provided that, for the purpose of preservation, the reports and abstracts therefrom referred to may be deposited with the county clerk. If these reports are placed in a proper receptacle or package and kept in a safe and accessible place, the duty of the school superintendent and the duty of the county clerk with reference thereto would be performed.

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Mount Vernon Charter (Laws of 1892, Chapter 182) — Constitution, Article 8, Section 1 — GENERAL MUNICIPAL LAW, Section 5 — HOME RULE BILL (Laws of 1913, Chapter 247) as to Power to Borrow Money in Advance of Special Assessments — Charter Amendments Suggested

(Dated September 21, 1916)

**Limitations upon powers granted under the city charter of Mount Vernon.**

The city of Mount Vernon is without authority to borrow money on temporary loans, or otherwise, to provide funds for payment to contractors in installments while work is in progress where the cost of the work, or some part thereof, is to be raised by special assessment.

The charter of the city of Mount Vernon is believed to be defective in that it fails to provide a method by which the city may borrow on temporary loan to pay installments due contractors engaged in public work prior to the levy and collection of the special assessments.

The Common Council of the City of Mount Vernon submitted inquiries as follows:

“(1) Has the city of Mount Vernon power, under chapter 247 of the Laws of 1913, or otherwise, to borrow money upon short

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period certificates of indebtedness, or otherwise, to provide moneys or funds to be paid to public contractors in installments as the work progresses upon public contracts, the cost of which must ultimately be raised in part, at least, by special assessment?

"(2) If the city has such power, what is the most adaptable method of providing such temporary finances pending the issuance of bonds to pay for the work?

"(3) If special legislation is, in your opinion, necessary, what sections of the city charter should be amended and in what particulars?"

TRAVIS, Comptroller.—Mount Vernon is a city of the third-class. Chapter 182 of the Laws of 1892, and the acts amendatory thereof and supplemental thereto, constitute the charter of the city.

Respecting inquiry No. 1, it is found that section 201 of the charter, as amended by chapter 374 of the Laws of 1905, regulates the issuance of what are known as "assessment bonds." That section provides that assessment bond may be issued only when the receiver of taxes has reported to the common council the amount of assessments collected by him under a warrant for such collection, and that such bonds may be issued, to use the language of the statute, "to the amount of such assessment then remaining unpaid." Then follows provisions for the manner of issuing bonds, the rate of interest to be paid and the period for which they may be issued. Power is given to the common council to convert such bonds into money at not less than par value or to obtain loans upon the same, and the condition is imposed that the proceeds of such bonds shall be applied only for the purpose for which the assessment so reported was laid and for the expenses of the assessment sales and redemption notices.

Section 201, as amended, also contains a clause which indicates that the Legislature intended that the city might advance money in anticipation of such bond issue. So far as applicable, it reads as follows: "but nothing in the act hereby amended, or in any act amendatory thereof or supplementary thereto, shall be construed to prevent the reimbursement to the city of Mount Vernon of any sums by it advanced in anticipation of such bond issue."

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I can find no provision of the city charter, and have been referred to none, which provides or indicates how, or from what funds, the city may advance moneys in anticipation of the issuance and sale of assessment bonds. I infer that it was contemplated by the framers of the act that the city might have surplus moneys, not otherwise appropriated, which might be available.

Section 201 and the related sections of the city charter afford no authority for borrowing money on temporary loan. The authority to borrow is limited to the issuance of assessment bonds for an amount equal to the unpaid assessments reported by the tax receiver. Therefore, loans could not be issued under this provision of the charter until the work is completed, the assessment levied, and a return of unpaid assessments filed.

Chapter 247 of the Laws of 1913, familiarly known as the Home Rule Bill, in subdivision 5 of section 20, purports to authorize cities "To become indebted for any public or municipal purpose and to issue therefor the obligations of the city, to determine upon the form and the terms and conditions thereof, and to pledge the faith and credit of the city for the payment of principal and interest thereof, or to make the same payable out of or a charge or lien upon, specific property or revenues."

This grant of power is limited by subdivision 2-a of section 23 of the same act, as follows: "No city shall issue any obligations for expenses for maintenance, repairs or current operation or administration of the property or government of the city or otherwise than for betterments, improvements and acquisitions of property of a permanent nature or for the purpose of refunding obligations of the city."

Again, the entire grant of specific powers to cities contained in section 20 of the Home Rule Bill is made in the introductory sentence to section 20 "subject to the Constitution and the general laws of this State."

Section 1 of article 8 of the Constitution provides that it shall be the duty of the Legislature to provide for the organization of cities and to restrict their power of taxation, assessment, borrowing money, contracting debts and lending their credit so as to prevent abuses in assessments and in contracting debts by such

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cities. In accordance with that requirement of the State Constitution, the Legislature has restricted the power of cities to borrow money.

Section 5 of the General Municipal Law reads, in part, as follows: "Moneys shall not be borrowed by a municipal corporation on temporary loan, except in anticipation of the taxes of the current fiscal year, and for the purposes for which such taxes are levied, and shall not be in excess of the amount of such taxes."

Special assessments levied for local improvements are not taxes within the meaning of that term as used in section 5 of the General Municipal Law. Therefore, temporary loans based upon such assessments are prohibited by the general laws of the State, enacted in compliance with constitutional requirements. As has been seen, the Home Rule Bill does not supersede any general law of the State, and the General Municipal Law is a general law of the State.

For the reasons stated above, I conclude that the city of Mount Vernon is without power to borrow money upon temporary loans, or otherwise, to provide moneys or funds to be paid to public contractors in installments as the work progresses, in that class of instances where the cost of the work, or some part thereof, is ultimately to be raised by special assessment.

Respecting inquiry No. 2, inquiry No. 1 having been answered in the negative, no answer is required to inquiry No. 2.

Concerning inquiry No. 3, permit me to say that I deem the Mount Vernon city charter defective in that it does not provide a method, pursuant to which the city may borrow on temporary loan to pay installments due contractors prior to the completion of the work and the levy and collection of the assessments. Such provisions are found in many city charters. I believe the Mount Vernon city charter should be amended in this respect. Quite likely, the answer to this question is more properly a subject for determination by the city's officials. It occurs to me, however, that such an amendment could well be made by inserting in the charter, after section 201, a new section to be section 201-a, to provide for the negotiation of temporary loans for the purposes covered by this inquiry.

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**TAX LAW, Sections 2, 88-a, 89, 299, 306 — VILLAGE LAW, Section 126, as to Collection of Unpaid Taxes on Special Franchises and on Personal Property**

(Dated September 23, 1916)

**Discussion of certain taxes as to their nature and how collectible.**

A tax levied against a special franchise is a tax on real estate, and its collection may be enforced by advertisement and sale in the same manner as other taxes on real estate. If the tax be levied against an incorporated company an additional remedy is prescribed by section 306 of the Tax Law.

A tax is not a debt. It is not founded on contract, and is not collectible by action, except where so authorized by statute. For the collection of unpaid taxes on personal property exceeding ten dollars in amount, proceedings supplementary to execution may be instituted under authority of section 299 of the Tax Law.

William X. Denniston, county treasurer, Waterloo, Seneca county, N. Y., submitted an inquiry as follows:

“What steps should be taken to collect returned taxes on personal property and special franchises?”

TRAVIS, Comptroller.—The inquiry relates to taxes on two classes of property — that is, taxes on personal property and taxes on special franchises, and may be rearranged as follows:

What steps should be taken to collect returned taxes (a) On special franchises? (b) On personal property?

**(a) ON SPECIAL FRANCHISES.**

By section 2 of the Tax Law a franchise, known as a “special franchise” is included within the meaning of the terms “land,” “real estate” and “real property,” as such terms are used in the Tax Law. Since a tax on a “special franchise” is a tax on real estate, its collection may be enforced by advertisement and sale in the same manner as other taxes on real estate, as prescribed by article 7 of the Tax Law. Article 7 relates to the enforced collection of unpaid taxes on real estate in non-forest preserve counties

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and applies to the county of Seneca. Inasmuch as the various steps leading to a sale are specifically enumerated in the article mentioned, it is deemed unnecessary to repeat them here.

As a preliminary, however, to the procedure of advertisement and sale, attention is called to the provisions of sections 88-a and 89 of the Tax Law.

Under authority of these sections, a county treasurer is required to examine the accounts of unpaid taxes delivered to him by the tax collector, and, on or before May first, to deliver to the supervisor of the tax district an abstract or list of all taxes on lands (including special franchises) not described or so imperfectly described or erroneously assessed, in form or substance, that the collection of the same by sale cannot be enforced. Thereupon, the supervisor is required, if within his power, to procure accurate descriptions and return the same, with the correct amount of taxes, to the county treasurer. If proper descriptions be obtained, the property should then be included in the list of lands advertised for sale. If proper descriptions be not obtained and the taxes remain unpaid, the amount thereof is either reassessed by the supervisor against specific parcels or levied by the board of supervisors against the tax district in which originally assessed.

If the special franchise tax is levied against an incorporated company, a remedy in addition to that of advertisement and sale described above is provided by section 306 of the Tax Law, which is as follows: "It shall be the duty of the attorney-general, on being informed by the comptroller, tax commissioner or by the county treasurer of any county that any incorporated company refuses or neglects to pay the taxes imposed upon it, pursuant to articles one and two of this chapter, to bring an action in the supreme court for the sequestration of the property of such corporation and the court may so sequester the property of such corporation for the purpose of satisfying taxes in arrear, with the costs of prosecution, and may, also, in its discretion, enjoin such corporation and further proceedings under its charter until such tax and the costs incurred in the action shall be paid. The attorney-general may recover such tax with costs from such delinquent corporation by action in any court of record."

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## (b) ON PERSONAL PROPERTY.

The collection of taxes on personal property returned by a tax collector as unpaid presents a problem fraught with much more difficulty than in the case of taxes which are liens on real estate. The courts of New York State have held that a tax is not a debt but an impost. It is not founded on contract and is not collectible by action, except where there is express statutory authority. *Rochester v. Gleichauf*, 40 Misc. Rep. 446; *Rochester v. Bloss*, 185 N. Y. 42. Many city charters contain provisions which authorize the enforcement of unpaid taxes by action, and section 126 of the Village Law provides a similar remedy in case of village taxes. There is, however, no such provision in the Town Law, the County Law or the Tax Law. It follows, therefore, that if, after exhausting the remedies provided by the statutes hereinafter mentioned, a tax on personal property remains uncollected, it is unenforceable and a loss must be borne by the municipality.

When a town collector has completed his work and filed with the county treasurer a proper statement of unpaid taxes, which contains items of taxes on personal property, the treasurer should examine the same and if he finds thereon such an item exceeding ten dollars in amount he should endeavor to enforce collection thereof by supplementary proceedings in the manner prescribed by section 209 of the Tax Law, which is in part as follows:

"If a tax exceeding ten dollars in amount levied against a person or corporation is returned by the proper collector uncollected for want of personal property out of which to collect the same, the supervisor of the town or ward, or the county treasurer or the president of the village, if it is a village tax, may, within one year thereafter, apply to the court for the institution of proceedings supplementary to execution, as upon a judgment docketed in such county, for the purpose of collecting such tax and fees, with interest thereon from the fifteenth day of February after the levy thereof. Such proceedings may be taken against a corporation and the same proceedings may thereupon be had in all respects for the collection of such tax as for the collection of a judgment by proceedings supplementary to execution thereon



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against a natural person, and the same costs and disbursements may be allowed against the person or corporation examined as in such supplementary proceedings but none shall be allowed in his or its favor."

If the treasurer finds an item of unpaid personal tax levied against an incorporated company, he may report the same to the Attorney-General as in the case of special franchise taxes referred to above, or, if the amount exceeds ten dollars, he may resort to supplementary proceedings under authority of section 299 last above quoted.

I have pointed out in the foregoing the only statutory provisions which may be invoked to enforce collection of delinquent taxes. I have shown that with reference to taxes on special franchises a positive method is prescribed. Such a tax may be collected by a sale, or, if a sale is impossible, the fault rests with the town officials and the town is penalized by charging the amount thereof against the town.

I have also shown that with reference to personal property taxes (except where the amount is less than ten dollars) the statutes provide methods for collection. But, because of the character of personal property and because it may be concealed from the most efficient officials, the remedies prescribed may fail and the question arises as to distribution of the loss, that is to say, whether it shall be borne wholly by the county or by the county and the town in which the property was assessed.

The whole question of the levy and assessment of personal property taxes is in a most unsatisfactory condition and is even now receiving the attention of tax experts with a view of clarifying the situation. Very many students of the question favor the abolishment of all personal property taxes, but as the law stands at present personal property is taxable and a county treasurer may find himself confronted with the problem here presented.

As a general proposition counties and county officers have only such powers as are expressly conferred by statute or as are necessarily implied in order to give effect to the powers granted. As a corollary, I believe counties have authority to adjust equities between the county and towns, and when a county treasurer has on

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his records an item (or items) of unpaid personal property taxes, which, after the exhaustion of the remedies cited, prove to be uncollectible, he should charge the same to the county and the town in the proportion which county and town taxes bear to each other, including in the county's share the apportionment of the State tax, if any, and reporting the matter in detail to the board of supervisors.

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COUNTY LAW, Section 38, as to Fire Districts Outside Incorporated Villages — Power and Authority of Commissioners — Meeting of Taxpayers — Levy of Tax

(Dated September 25, 1916)

**How fire districts outside of incorporated villages may be established.**

Fire districts outside of incorporated villages may be established by boards of supervisors under authority of section 38 of the County Law. The same section outlines the powers of the fire commissioners and the methods of levying and collecting taxes.

George W. Burton, Supervisor, Mamaroneck, N. Y., submitted a statement of facts and an inquiry based thereon as follows:

"The Weaver street fire district is a fire district within the unincorporated portion of the town of Mamaroneck, in the county of Westchester, N. Y. A committee representing the taxpayers within the district has requested the town board to make provision for the installation of a suitable fire alarm and for the purchase of 500 feet of hose. A balance from the last tax levy remains unexpended but the amount is not sufficient to meet requirements.

"What power or authority is vested in either the supervisor or the town board, severally or jointly, to procure the foregoing requirements?"

TRAVIS, Comptroller.—I have found no special statute applicable to the fire district mentioned and therefore assume and believe that the provisions of the general laws of the State are controlling.

Section 38 of the County Law authorizes boards of supervisors to establish fire districts outside of incorporated cities and villages.

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Subdivision 3 of the section cited is in part as follows: "Any such district when established or consolidated shall be known by such name as the fire commissioners thereof may adopt at their first meeting, and thereafter such fire commissioners shall be authorized and empowered to purchase apparatus for the extinguishment of fires therein; rent or purchase suitable real estate and buildings or erect, alter or repair buildings, for the keeping and storing of the same; and to procure supplies of water, and have control and provide for the maintenance and support of a fire department in such district \* \* \* and who shall have power to make any and all contracts within the appropriations voted by the resident taxpayers of the district for the purpose of carrying out the authorization and powers herein granted."

Subdivision 4 of the same section authorizes the commissioners to expend in any one year for any or all of the purposes above specified, a sum or sums not exceeding the total of one hundred dollars and in addition to "make a contract for a supply of water for fire purposes for a period not to exceed five years, without any appropriation voted therefor by the taxpayers of such district."

Subdivision 5 of the same section is in full as follows: "Whenever the fire commissioners in any such fire district shall submit a request in writing for an appropriation of any sum of money for the purposes herein authorized, the clerk or clerks of the town or towns in which such fire district shall be located, shall call a meeting of the resident taxpayers of the district for the purpose of voting upon the question of appropriating such money, such meeting to be called by a notice posted conspicuously in at least two of the most public places in such fire district, at least ten days before the holding of any such meeting, which notices shall state the time, place and purpose of the meeting. At any such meeting such resident taxpayers may appropriate the amount requested by the fire commissioners or any less amount, and may determine that the sum so appropriated or some part thereof shall be raised by installments. When any such appropriation is made, or when any amount less than the sum of one hundred dollars shall have been expended by such fire commissioners, as above authorized, the amount appropriated or expended and the amount contracted

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to be paid yearly for the supply of water for fire purposes, shall be assessed, levied and collected on such district, in the same manner, at the same time and by the same officers as the taxes of the town in which the district is located, are assessed, levied and collected, and when collected shall be paid over immediately by the supervisor of the town to the treasurer of the fire district; and the town shall be responsible for any and all sums so collected until the same shall be paid over to such treasurer."

It will be seen from the foregoing that neither the supervisor of the town nor the town board thereof has any power or authority in the premises.

Since the appliances in question cannot be purchased or installed for a sum within the available fund and the limitations of subdivision 4 (cited above), I am of the opinion that the committee representing the taxpayers and fire companies of the district did not perceive the proper procedure to be followed. It is that outlined in subdivision 5 quoted above. Briefly, they should procure the fire commissioners to prepare and file with the clerk of the town a request for an appropriation sufficient to meet the expenses contemplated. Thereupon it becomes the duty of the town clerk to call a meeting of the resident taxpayers at which meeting the request is to be considered and a vote thereon taken. If the vote be in the affirmative, the fire commissioners may then make the necessary contracts, and the amounts so appropriated at the meeting of the taxpayers will be included in the next ensuing tax levy.

It will be noted, however, that if a meeting of the taxpayers should be held at this time and the proposition adopted, although the fire commissioners may immediately make the necessary contracts, no moneys can legally be made available until the taxes levied to meet such expenditures have in fact been collected, unless under authority of subdivision 4 the taxpayers at the meeting decide upon the collection of the necessary amount in installments. In case that is done, the fire commissioners are authorized to borrow so much of the same as may be necessary at a rate of interest not exceeding the legal rate, and to issue bonds or other evidences of indebtedness therefor.

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CODE OF CIVIL PROCEDURE, Section 3306-a and COUNTY LAW,  
Section 168, as to Court and Trust Fund Register — Duties of  
County Clerk — Fees

(Dated October 5, 1916)

**Requirements of the County Law as to the keeping of a court register and  
entries to be made therein.**

Section 168 of the County Law requires each county clerk to keep a register of court and trust funds and to insert therein a record of every judgment of foreclosure entered in his office.

For making such an entry the clerk is entitled to a fee of fifty cents, as provided by section 3306-a of the Code of Civil Procedure.

Hon. John F. Hennessy, county clerk, Ballston Spa, N. Y., submitted a statement of facts and inquiries based thereon as follows:

“It appears that in the county of Saratoga every judgment of foreclosure entered in the office of the county clerk contains a clause similar to the following: ‘that the said referee deposit the surplus moneys, if any, within five days after the same shall be received and be ascertainable, with the treasurer of said county \* \* \*.’

“(1) Does the law relating to the keeping of a court and trust fund register contemplate the insertion therein of every such judgment of foreclosure entered?

“(2) If so, am I justified in exacting an additional fee of fifty cents for each such judgment, as provided in section 3306-a of the Code of Civil Procedure?”

TRAVIS, Comptroller.—The first inquiry is answered by section 168 of the County Law. It provides for the keeping in the office of the county clerk of a book to be known as “a court and trust fund register,” and further reads, in part, as follows: “Immediately upon the filing in his office of any judgment, order or decree of any court directing the payment or transfer of money or securities to the treasurer of his or any other county of the state,

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\* \* \* or upon the filing in his office of any report of a referee or other person, or treasurer's \* \* \* receipt, stating that a sum of money has been deposited with such treasurer \* \* \*, in accordance with any such judgment, order or decree or with any provision of law; or upon the filing or entry in his office of any other paper or record from which it appears that money or securities have been or *should be paid to such treasurer* \* \* \*; or upon the receipt by any such clerk of moneys required by any judgment, order or decree of the court, \* \* \* the clerk shall enter in his court and trust fund register, the title of the action or proceeding in which such judgment, order or decree was made, or in which moneys are required to be deposited, *together with a statement of the amount so deposited, or ordered or required to be deposited, if said judgment, order or decree contains the amount of the same, or, otherwise, the amount to be deposited as shown by the report of the referee or other person, or of the amount received by such clerk, or shown by the records of his office, \* \* \**"

This section had its origin in section 1 of chapter 330 of the Laws of 1889. A careful analysis of that act and of all amendments and supplements convinces me that it is the duty of the county clerk to enter in this court and trust fund register all judgments, orders and decrees in actions or proceedings which (a) direct the payment of a definite sum into the hands of the treasurer or the deposit of securities with him, and (b) by their terms contemplate, without fixing the amount, that some sum may ultimately be paid into court.

This register I conceive to be the foundation or basis upon which to predicate an examination to determine whether or not all funds and securities which should be paid into court have, in fact, been so paid.

The second inquiry is more difficult of solution.

Section 3306-a of the Code of Civil Procedure reads as follows: "The county clerk shall be entitled to receive, for making the entries required of him by law of moneys deposited with the county treasurer, the sum of fifty cents in each case, to be paid

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by the party to the action or proceeding and taxed as a disbursement therein."

Construed literally, this section seems to fix a fee of fifty cents for the completed act; that is, for making the entries "required of him by law of moneys deposited." From this language it may well be contended that the clerk is not entitled to the fee until the moneys or securities have actually been "deposited" with the county treasurer.

It is necessary, however, in order that a correct conclusion be reached, to study the history of this section of the Code. It, too, had its inception in chapter 330 of the Laws of 1889. It was, in substance, section 2 of that act. At the time of the consolidation of the statutes in 1909, section 1 of the 1889 act, as amended, was made section 168 of the County Law, and section 2, with a changed phraseology (the change being made necessary because section 1 no longer immediately preceded it) was inserted in the Code of Civil Procedure, section 3306-a.

At the time of the consolidation, section 1 of chapter 330 of the Laws of 1889, as amended by chapter 544 of the Laws of 1895, chapter 486 of the Laws of 1901, and chapter 185 of the Laws of 1908, required county clerks to enter in the court and trust fund register all judgments, orders and decrees substantially as now required by section 168 of the County Law.

At that time section 2 of chapter 330 of the Laws of 1889 (now section 3306-a of the Code), as amended by chapter 544 of the Laws of 1895, read as follows: "The county clerk shall be entitled to receive, for making *such entries*, the sum of fifty cents in each case, to be paid by the party to the action or proceedings, and taxed as a disbursement therein."

The word "such" referred to the entries required to be made by section 1 (now section 168 of the County Law). Obviously, when sections 1 and 2 of chapter 330 of the Laws of 1889, as amended, were separated from each other, it became necessary to eliminate the word "such" from section 2. If section 2 had been removed to the Code of Civil Procedure without a change in phraseology, the word "such" would have referred to nothing immediately preceding because that to which it referred had been

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inserted in the County Law. Therefore, the consolidators changed section 2 when they made it section 3306-a of the Code, by leaving out the word "such" and by substituting in its place and stead the words "required of him by law of moneys deposited with the county treasurer."

In the consolidators' notes on this subject may be found an explanation of this change. They say: "The matter inserted in this section is necessitated by the omission of the word 'such' and the incorporation of L. 1889, Ch. 330, sec. 2, as an independent section of the code of civil procedure."

From the foregoing it will be observed that prior to the consolidation the county clerk was entitled to a fee of fifty cents for each entry required to be made in the court and trust fund register, irrespective of whether or not the moneys or securities had actually been deposited with the county treasurer.

We have now to consider the effect of the consolidation and of the change in the phraseology of section 2 of the 1889 act. In this connection chapter 596 of the Laws of 1909 becomes important. The last sentence of section 1 of that chapter reads as follows: "The true purpose and intent of this act is to prescribe that the statute law of the state, so far as it has been reproduced in such consolidated laws and in such amendments to the code of civil procedure and the code of criminal procedure, and in said chapter 240 of the laws of 1909, *and all said laws in force at the time of the enactment of such consolidated laws, shall be of the same force and effect as they were before the enactment of such consolidated laws or code amendments* or said acts amendatory thereof.

From the foregoing the conclusion is inevitable that a rearrangement of statute law and a change in its phraseology by the consolidators did not work a change in the law itself. The law after the consolidation remained identical with that which existed before the consolidation. Even without the statement of the purpose and intent of the Legislature in enacting the Consolidated Laws, I am of the opinion that the courts would construe section 3306-a of the Code in connection with section 2 of chapter 330 of the Laws of 1889, as amended, for the purpose of determining



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the service for which a county clerk is entitled to charge a fee of fifty cents.

A similar question was before the court in *People ex rel. Conine v. Steuben County*, 183 N. Y. 114. At page 122 of the opinion, the following is found: "The county law must be read in connection with the general law which it revises."

I therefore conclude that both inquiries should be answered in the affirmative.

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In the Matter of the Appeal of JOHN G. BLUMENSTOCK from the Action of the Town Board of the Town of Cherry Valley, Otsego County, in Declaring the Office of School Director of Said Town Vacant and in Appointing Dorr L. Snyder to Fill Such Vacancy

Case No. 333

(Decided September 23, 1916)

**Legality of the election of a district superintendent will, in every case, depend upon the qualifications of the school directors.**

The appellant, John G. Blumenstock, was elected as school director for the town of Cherry Valley for a term of five years, from January 1, 1913, at the general election held in said town on November 5, 1912. The board to which he was elected had no occasion to meet until the third Tuesday in May, 1916, for the purpose of reorganizing by the election of necessary officers. Under these circumstances, the appellant did not realize the necessity of taking and filing an oath of office, but on May 22, 1916, he executed such oath which was duly filed in the town clerk's office in Cherry Valley, but which was defective in form. Thereafter, and on June 7, 1916, the town board adopted a resolution declaring vacant the office of school director because of appellant's failure to file his oath within thirty days after his election. *Held*, that under the cases a public officer who fails to comply with statutory requirements as to the execution and filing of official oaths has defeasible title to the office, but that it is also the rule that if an official oath is executed and filed before judicial declaration of a vacancy, the officer is entitled to his office on taking and filing the said oath. The appellant subscribed and took an oath of office on June 15, 1916, subsequent to the filling of the vacancy by the town board. *Held*, also, that the board, in declaring the vacancy, acted entirely within their scope. Appeal dismissed.

Barnum Brothers, attorneys for appellant.

Dennis J. Kilkenny and George M. Palmer, attorneys for respondents.

FINLEY, Commissioner.— This appeal is brought from the action of the town board of the town of Cherry Valley, Otsego

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county, in declaring the office of school director in such town vacant and in appointing Dorr L. Snyder to fill such vacancy. The appellant, John G. Blumenstock, was elected as school director for the town of Cherry Valley for a term of five years from January 1, 1913, at the general election held in said town on November 5, 1912. No question is raised as to the legality of such election.

The law provides for the election of two school directors for each town in a supervisory district. Such directors constitute a board, whose only duty is to elect a district superintendent of schools for such supervisory district whenever there is a vacancy in the office, caused by expiration of term or in any other manner prescribed by law. The board of which the appellant was a member had no occasion to meet until the third Tuesday in May, 1916, for the purpose of organizing by the election of the necessary officers. See Education Law, § 383. The appellant met with the board at this time and participated in its proceedings.

The appellant did not realize the necessity of taking and filing an oath of office until May 20, 1916. On May 22, 1916, he executed an oath of office, which was filed in the office of the town clerk of Cherry Valley on said day.

The town board of the town of Cherry Valley held a meeting on June 7, 1916, and adopted a resolution declaring vacant the office of school director to which the appellant was elected, because of the fact that he had failed to file his oath of office within thirty days after his election and also had failed to file his statement of expenses incurred in such election within the time required by law. The board thereupon adopted a resolution appointing Dorr L. Snyder to fill such vacancy.

Article 14 of the Education Law, as inserted by chapter 607 of the Laws of 1910, creates the office of district superintendent of schools, provides for the election of such officer and prescribes his powers and duties. School directors are town officers for the sole purpose of providing for election of a district superintendent. The legality of the election of a district superintendent will in every case depend upon the qualifications of the school directors. Section 398 of the Education Law provides that "All questions

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in controversy relating to the election of such district superintendent or to the formation of supervisory districts shall be determined by the Commissioner of Education on proper appeal."

The respondent town board has contended through its counsel that its acts in declaring the office vacant and appointing Mr. Snyder to fill such vacancy are not subject to review on appeal by the Commissioner of Education. The question in controversy in this appeal relates to the election of a district superintendent, within the meaning of the provision above quoted. The board of school directors in a supervisory district performs an important educational duty; its official functions relate directly and exclusively to the administration of the State system of schools, and it comes within the purpose and intent of the statutory remedy of appeal to the Commissioner of Education to inquire as to the qualifications of its members. The controversy necessarily relates to the election of a district superintendent and may properly be determined in this appeal.

It is clear that the appellant through inadvertence failed to execute and file the required oath of office. It is provided in subdivision 3 of section 382 of the Education Law that "A school director before entering upon the discharge of the duties of his office, and not later than thirty days after the date on which he was elected to office, shall take the oath of office prescribed by the Constitution." The Education Law contains no provision as to the effect of the failure of a school director to take and file his oath of office. It is provided in section 30 of the Public Officers Law that the refusal or neglect of a public officer to file his official oath before the expiration of fifteen days after the commencement of the term for which he is chosen, creates a vacancy. This provision of the Public Officers Law applies generally to all local officers, unless there are conflicting provisions as to a special officer. This provision supplements the provision of the Education Law as to the constitutional oath of office of a school director, by providing that if the oath of office is not taken within fifteen days from the commencement of the term the office shall be vacant.

The rule is established by weight of authority that a public

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officer who fails to comply with statutory requirements as to the execution and filing of official oaths has a defeasible title to the office. It also appears to be the rule that if an official oath is executed and filed prior to judicial declaration or official recognition of the existence of a vacancy, the officer is entitled to his office. The courts have, however, on all occasions required a substantial compliance with the constitutional requirement that every public officer execute and file an oath of office in the form prescribed by the Constitution. See *People ex rel. Williamson v. McKinney*, 52 N. Y. 374. Also *People ex rel. Preston v. Keator*, 169 App. Div. 368.

Assuming that the appellant possessed a defeasible title to the office to which he was elected prior to the time when he executed and filed his oath of office, the statute declares that a vacancy exists because of the failure to execute and file such oath. It is provided in section 83 of the Town Law that every person elected to a town office shall, before he enters upon the duties of his office, take and subscribe the constitutional oath of office, and that a neglect or omission to take and file such oath within the time required by law "shall be deemed a refusal to serve and the office may be filled as in case of vacancy." School directors are elected by the electors of a town, in the same manner as other town officers, and in their representative capacities as members of the board of school directors they must be regarded as town officers. They are therefore subject to the provisions of this section of the Town Law for the purpose of determining the effect of a failure to execute and file an official oath in the manner prescribed by law. It is therefore apparent that the failure of the appellant to execute and file an official oath created a vacancy in his office which might be filled by the town board of the town of Cherry Valley.

If he had executed and filed the oath in the form prescribed by the Constitution, prior to the action of the town board in filling the vacancy, his title to the office would have become absolute and the action of the town board would have been ineffectual. It appears from the papers in the case that the appellant attempted to subscribe and file the constitutional oath of office on May 22, 1916, prior to the action of the town board in filling the vacancy.

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This oath did not conform to the requirements of section 1 of article XIII of the Constitution, in that it did not contain the following statement: "And I do further solemnly swear (or affirm) that I have not directly or indirectly paid, offered or promised to pay, contributed, or offered or promised to contribute, any money or other valuable thing as a consideration or reward for the giving or withholding a vote at the election at which I was elected to said office, and have not made any promise to influence the giving or withholding any such vote." This is an essential part of the oath of office. An omission to include it invalidates the oath. It has been so held in a recent case in the Appellate Division of the Supreme Court. See *People ex rel. Preston v. Keator*, 169 App. Div. 368.

The appellant in order to cure this defect subscribed and filed an oath of office containing the required provision, on June 15, 1916. This was subsequent to the filling of the vacancy by the town board. Prior to the filing of an oath of office in the form prescribed by the Constitution, the town board was authorized by statute to fill the vacancy. They appointed Mr. Dorr L. Snyder as a school director to fill such vacancy. The subsequent filing of a correct oath did not defeat the right of the board to fill the vacancy. It must therefore be held that Mr. Snyder was elected legally as a school director to fill the vacancy caused by the appellant's failure to execute and file an oath of office in the form prescribed by the Constitution.

The appeal is dismissed.

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**In the Matter of the Appeal from the ACTION TAKEN AT THE ANNUAL DISTRICT MEETING IN DISTRICT No. 1, TOWN OF SHERMAN, CHAUTAUQUA COUNTY, Relative to Contracting for the Instruction of the Children of the District**

**Case No. 329**

**(Decided September 26, 1916)**

**The proceedings of a district school meeting will not be set aside as invalid because there has been a technical failure to give due notice of the meeting.**

At the annual district meeting, in school district No. 1, town of Sherman, Chautauqua county, a resolution was adopted authorizing the trustee to contract with surrounding districts for the education of the children in the district. The appellants urge that the proceedings were illegal because some of the five notices of the meeting were not duly posted. No fraudulent intent is charged nor is it shown that any elector was injured by the failure to post the said notices. It has not been shown that any of the votes cast were cast by nonresidents of the district. Appeal dismissed.

David H. Stanton, attorney for petitioners.

FINLEY, Commissioner.— At the annual district meeting in district No. 1, town of Sherman, a resolution was adopted authorizing the trustee to contract with the surrounding districts for the education of the children residing in district No. 1, under the provisions of sections 580-586 of the Education Law. Nineteen votes were cast upon said proposition, of which ten votes were in favor of the resolution and nine opposed.

It is alleged by the appellants that the acts and proceedings of the annual meeting were illegal because some of the five notices of the annual meeting were not posted as required by section 193 of the Education Law. There was no fraudulent intent in failing to duly post the notices alleged or proven, and it does not appear that any qualified elector was deceived by such failure. It has been ruled that the acts and proceedings of an annual meeting are

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not invalid because of failure or defect of notice. The resolution may not be set aside because of insufficient notice of the meeting.

The only other objection to the validity of the resolution, worthy of note, pertains to the qualifications of two of those who voted at the meeting. The appellants allege that such persons were not residents of the district at the time of the meeting and had no legal right to vote. The respondent denies such allegations and asserts that they were qualified electors of the district. The appellants fail to establish by a preponderance of proof that the alleged disqualified voters were nonresidents of the district. To set aside the acts of a meeting because of illegal voting it must be shown by competent evidence that facts exist which make those participating in such acts disqualified as electors of the district. The mere assertion of nonresidence is insufficient.

The appellants have failed to show that the resolution authorizing the trustee of the district to contract with other districts for the instruction of its pupils was adopted illegally, and it must be ruled that the action of the meeting was lawful. The contracts so authorized should be executed forthwith by the trustee, and transmitted to the district superintendent for his consideration. The district superintendent will then transmit the same to this Department with his suggestions as to their approval. The Commissioner of Education will approve them if it appears for the educational interests of the children of the district that the school therein be closed and that they be instructed in the schools of the neighboring districts. The appellants may state in a formal protest against such contracts their reasons why they should not be approved. Their statement and all other matters in respect to the proposed contracts will be carefully considered, and it will be determined whether it is to the advantage of the children to open and maintain the home school. If the contracts are disapproved it will be the duty of the trustee to employ a teacher and open the school.

The appeal is dismissed.



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In the Matter of the Appeal of ANNA C. DAVERN from the Action of the Trustee of District No. 1, Town of Clifton Park, Saratoga County, Relative to her Employment as Teacher

Case No. 335

(Decided October 7, 1916)

Where there does not appear to have been an unconditional offer of the position as teacher for an agreed price, there is no basis for appeal from the action of the trustee in refusing to renew a former contract.

Anna C. Davern, the appellant, was employed as a teacher in district No. 1, town of Clifton Park, Saratoga county, for the years 1914-15 and 1915-16. She alleges that about May 4, 1914, the trustee of the district gave her a verbal promise that she should have the "first chance" for the ensuing year. Subsequently, however, they had correspondence as to increased duties and increased pay. *Held*, that nothing has been shown upon which to base a claim that an agreement of employment was reached. Appeal dismissed.

James J. Barry, attorney for appellant.

John McLane, respondent in person.

FINLEY, Commissioner.— The appellant, Anna C. Davern, was employed as teacher in school district No. 1, town of Clifton Park, Saratoga county, for the school years of 1914-15 and 1915-16. She complains of the refusal of the respondent trustee to enter into a contract with her for the school year of 1916-17. She alleges in her petition that on or about May 4, 1916, the respondent promised verbally that she should have the "first chance" to teach the school during the ensuing year. It appears, however, that on May 22, 1916, the respondent stated to the appellant that she would be required to teach more pupils, to be transferred to her room from another room during the ensuing year, and the appellant then insisted that she was entitled to an increase of one dollar per week in her compensation. Some question had evidently arisen as to the necessity of making up lost time in order

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to complete the present school year. The appellant asked the respondent to advise her as to whether it would be necessary to make up such time. In response to this inquiry he stated that unless the superintendent insisted on making up such lost time it would not be required. He then stated: "In regard to wages, thirteen dollars (\$13.00) per week is the best I can do and 38 weeks school." This letter was dated May thirty-first. On the following day the appellant called upon the respondent, prepared apparently to accept the position according to the terms specified in the respondent's letter. The respondent thereupon refused to enter into a contract with her.

There does not appear to have been an unconditional offer of the position to the appellant for an agreed price. The appellant desired an increase of compensation. The respondent refused to grant such increase. The letter above referred to, containing a statement as to the term of school and wages to be paid, did not contain a specific offer of the position and may not be construed as an agreement to employ the appellant upon the terms specified. The appellant has not presented sufficient proof to establish that there was any definite agreement as to length of term or compensation, and the proof does not disclose that a contract was made or that there was an agreement to employ the appellant. It must therefore be held that the appellant has no basis of complaint and her appeal must be dismissed.

The appeal is dismissed.

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In the Matter of the Appeal of CAROLYN W. GRISWOLD from a  
Resolution of the Board of Education of the City of New York

Case No. 315

(Decided October 7, 1916)

Re-argument of a case previously heard on motion based on the alleged ground that certain facts were disregarded in the original decision.

In this case the appellant, Carolyn W. Griswold, was employed as a clerical assistant in the Curtis High School in the borough of Richmond,

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city of New York, and was removed by the board of education of the city of New York for "gross misconduct, conduct unbecoming a teacher and insubordination." She appealed to the Commissioner and the school board was directed to reinstate her. The board of education applied for a re-opening of the appeal for re-argument; the motion was granted and the matter in its present form was re-argued on February 28, 1916. *Held*, that upon such re-argument the board of education had failed to disclose any material error in the determination of the appeal; it also failed to show affirmatively that the decision rendered did not conform to the facts or that serious error or mistake was made in determining the various questions involved in the appeal. The motion to set aside the decision in this appeal is, therefore, denied.

Bridges, Bacon, Aron & Vander Veer, attorneys for appellant.

Charles McIntyre, Assistant Corporation Counsel, City of New York, attorney for respondent.

FINLEY, Commissioner.— The appellant, Carolyn W. Griswold, was employed as a clerical assistant in the Curtis High School, borough of Richmond, city of New York, and served in such capacity in December, 1913, when charges were preferred against her for "gross misconduct, conduct unbecoming a teacher, and insubordination." The board of education, by resolution adopted January 14, 1914, dismissed her from the service of the board after a trial of the charges before the proper committee. An appeal was brought to the Commissioner of Education from such dismissal. It was determined upon such appeal that the dismissal was not justified, and the respondent board of education was directed to reinstate the appellant in her position as clerical assistant in the Curtis High School. Such decision was rendered June 29, 1915, and was subsequently filed in the office of the secretary of the board of education.

The respondent board of education, through the corporation counsel, made an application for a re-opening of the appeal for the purpose of re-argument. Such application was granted and the matter was re-argued before the Deputy Commissioner of Education on February 28, 1916.

The respondent board of education did not attempt to submit new evidence bearing upon the charges preferred against the

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appellant. The respondent contends that the decision was erroneous in that certain material facts relied upon as sustaining the charges of "gross misconduct, conduct unbecoming a teacher and insubordination," were disregarded in arriving at the conclusion that the appellant had been unjustly dismissed.

One of the acts relied upon as constituting the alleged misconduct was that the appellant, in a letter replying to a letter of the city superintendent of schools, "knowingly, deliberately and with intent to deceive the said city superintendent, made a false statement in reference to the cause of her absence" from her position. Other letters referred to in the answer to the petition upon the appeal, written by the appellant to her superior officers, have been characterized by the counsel for the respondent as impudent, impertinent and insolent, and it is insisted that the appellant in writing them was guilty of insubordination.

All of the letters were noted in the presentation of the appeal, and special reference thereto was made by the attorneys for the parties to the appeal in their briefs and arguments. The case was forcefully and exhaustively presented in behalf of the board of education, by its attorney, the assistant corporation counsel, and a careful review of all the facts and arguments submitted upon the original appeal shows that the grounds now asserted for a reversal of the decision were given due consideration. The decision discusses at length the alleged misconduct of Mrs. Griswold in failing or refusing to explain satisfactorily the cause of her absence from her duties. The following extract from the decision summarizes the conclusion therein reached: "When all the facts, however, in relation to her case are taken into consideration in connection with the unlawful policy which the board of education was pursuing toward married teachers who gave birth to children, appellant's conduct can not be held, as it was characterized by the report to the board of education, as disrespectful, discourteous or insubordinate; nor can it be reasonably held that it was the intention of the appellant to deliberately deceive the city superintendent and board of education. That appellant had given birth to a child was a matter of public record and such fact could easily have been ascertained by the board of education by proper inquiry.

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The letter written to appellant by Dr. Bardwell, before the specific inquiry was made by the district superintendent, indicated that the school authorities were fully informed of the facts and surely desired an affirmative reply from the appellant so as to present such statement to the board for the purpose of disciplining the appellant as it was the policy of the board to discipline teachers whose absence was caused by maternity. In view, therefore, of the action which has been taken in other recent similar cases in respect to the dismissal of married women teachers, absent from duty because of motherhood, the dismissal of the appellant based upon a finding of 'gross misconduct, conduct unbecoming a teacher and insubordination' can not be sustained."

The board of education has not successfully established its contention that the conclusion thus reached was not in accordance with the facts and did not fairly dispose of the issues of the case. A careful and exhaustive examination of the papers in the appeal and reconsideration of the arguments presented thereon do not disclose any material error in the determination of such appeal. The board of education has failed to show affirmatively that the decision rendered did not conform to the facts submitted, that material facts were presented upon the appeal that did not receive consideration, or that serious error or mistake was made in determining the various questions involved in such appeal. A decision on an appeal may not properly be set aside unless it be established that one of such conditions exists.

The order in the original decision setting aside the dismissal of the appellant by the board of education, directed such board to reinstate the appellant in her position as clerical assistant in the Curtis High School in the city of New York. No reference was made to the payment of compensation to the appellant during the period antedating such order. The order should be construed as permitting the board to use its discretion in determining as to the payment of compensation for the time intervening between the date of the resolution dismissing the appellant from her position and the date of the order directing her reinstatement.

The motion to set aside the decision in this appeal is denied.

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In the Matter of the Appeal of MAY ROBERTS from the Denial of Her Application for a Permanent License to Teach in the High Schools of the City of New York

Case No. 331

(Decided October 7, 1916)

Authority of a city superintendent of New York city public schools to grant permanent licenses to teachers.

May Roberts, the appellant, was appointed assistant teacher of German in the high schools of the city of New York. In 1912, because of an unfavorable report upon her work, a permanent license was not issued to her, but on October 1, 1912, her license was renewed for one year. At the end of that year the city superintendent, because of the reports in her case, refused her a permanent license, and she ceased to teach in the schools of the city. Subsequently she made formal application for reinstatement, but this was denied, and she thereupon brought this proceeding. *Held*, that the power of the city superintendent as to issuing permanent licenses was exclusive, and that the fact of the appellant having a college graduate's life certificate did not do away with the right of examination of such teacher in the city of New York. Appeal dismissed.

Marion Weston Cottle, attorney for appellant.

Lamar Hardy, Corporation Counsel (Charles McIntyre of counsel), attorney for respondent.

FINLEY, Commissioner.—The appellant, May Roberts, was an assistant teacher of German in the high schools of the city of New York. She obtained a license as an assistant teacher of German in 1909, and in October of that year was appointed to a position in the Far Rockaway High School. She retained such position until February 1, 1913, when she was transferred to a position as assistant teacher of German in the annex of the Richmond Hill High School.

Her license was issued under the regulations of the board of education for a period of one year from the commencement of

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service. Such license was renewed for a period of one year from October 1, 1910, and again renewed for one year on October 1, 1911. Because of an unfavorable report submitted by the principal of the Far Rockaway High School in June, 1912, the city superintendent of schools did not issue a permanent license to the appellant, but at the expiration of her third year of service, on October 1, 1912, he renewed her license for a further period of one year.

Unfavorable reports of her work as an assistant teacher in the Richmond Hill High School covering the school period from February 1 to June 1, 1913, were also submitted to the city superintendent of schools by the principal of such high school and the district superintendent. After consideration of such reports and of the work of the appellant as a teacher, the city superintendent on September 30, 1913, refused to make her license permanent. This refusal terminated the appellant's connection with the teaching service of the city. In November, 1915, the appellant filed a petition with the city superintendent of schools requesting that a permanent license as an assistant teacher in the high schools be granted to her. On December 10, 1915, the city superintendent notified her in writing that he had given full consideration to the matter and that he saw no good reason why he should reconsider his action in terminating her license in accordance with the power given to the city superintendent by section 1089 of the charter. On December 17, 1915, the appellant submitted the matter to the board of education of the city and asked for an order directing the city superintendent to issue a permanent license to her. The request was considered by the committee on by-laws and legislation of the board, and as a result the appellant's attorney was informed that the board of education had no jurisdiction of the matter since it was one "as to which, under the provisions of the Greater New York Charter, discretion is vested solely in the city superintendent of schools."

The appellant contends that the unfavorable reports as to her teaching were not sustained by the facts, and presents voluminous evidence as to her ability as a teacher, prior to her appointment as a teacher in the high schools of the city of New York, and as

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to her success in her classes and with the students under her instruction. The inference to be drawn from the allegations of the appellant and the arguments presented in her behalf is that the two principals of high schools and the district superintendent, who reported unfavorably of her work as a teacher in the schools under their control and supervision, were unwarrantably prejudiced against the appellant and were actuated by bad motives in presenting their reports. There is little, if any, evidence of bad faith on the part of such officers, and without affirmative proof to the contrary it will be assumed that their reports state the facts therein contained as they actually found them.

It is provided in section 1089 of the Greater New York Charter that "Licenses to teach shall be issued by the city superintendent of schools for a period of one year, which may be renewed without examination in case the work of the holder is satisfactory to the city superintendent for two successive years. At the close of the third year of continuous, successful service, the city superintendent may make the license permanent."

The language of the statute expresses clearly the legislative intent to confer upon the city superintendent sole discretionary power to make permanent temporary licenses granted to teachers as provided by law. It is for him to determine whether the work of a teacher has been such as to warrant a permanent license. If the service has been continuous and successful for a period of three years, he may or may not, as he deems advisable, make the license of the teacher permanent. The presumption is that if the teacher has been successful in her work for the required length of time she will be granted a permanent license. But her right to such license, even if successful, is not absolute; circumstances apart from her work at a teacher may exist which will justify the withholding of such license. The grant of the license after successful service is discretionary and not mandatory. The exercise of the power may not be compelled by the board of education, as ruled properly by it, upon the appellant's application; nor should the Commissioner of Education intervene unless it be shown by convincing proof that the city superintendent has been deceived grossly as to the facts or has refused, maliciously or capriciously, to exercise the authority conferred upon him.



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The evidence submitted by the appellant indicates that she has been successful as a teacher, both prior to her employment as a teacher in the high schools of the city of New York and during a portion of her service in such high schools. Such evidence consists largely of letters from former associates and students, bearing upon her general qualifications as a teacher. The city superintendent, in determining as to whether a permanent license should be issued, depended for his information upon supervising officers who came personally in contact with the appellant's work. He considered the reports and recommendations of such officers as sufficient to warrant the withholding of the appellant's permanent license. In refusing to grant the license he stated that he had considered her work, and it must be assumed, in the absence of positive proof to the contrary, that he had exercised a fair and reasonable discretion in taking the action that he did. There is certainly no proof of malice on his part, and in view of the comprehensive power as to permanent licenses conferred upon him by statute, it must be decided that his act was valid.

The appellant holds a college graduate life certificate which authorizes her to teach in any public school of this State. The holder of such a certificate may, under section 1089 of the Greater New York Charter, be exempted in whole or in part from examinations of teachers required of candidates who desire to be placed upon eligible lists in such city. The holder of such a certificate is not entitled as of right to be placed upon an eligible list without examination. It does not appear that the appellant was exempted from examination, and not having been exempted therefrom by the city superintendent, she is not entitled to be placed upon an eligible list. The holding of such certificate does not, under the circumstances of her case, aid her in seeking a permanent license.

The appeal is dismissed.

In the Matter of the Appeal of J. F. BERRY from the Refusal of the Board of Education of the City of New York to Direct the Board of Examiners to Issue to Him a License of First Assistant Teacher of Mathematics

Case No. 332

(Decided October 7, 1916)

In the city of New York the board of examiners has the responsibility of determining whether or not candidates for teaching licenses should be received by them.

J. F. Berry, the appellant, since 1899, has been an assistant teacher in the high schools of New York city. In 1907 he applied for the position of first assistant teacher of mathematics in high schools and passed the necessary examination. The board of examiners, however, in 1909, withheld his license because of his failure to meet the required practical and oral tests. The examiners based their action upon the appellant's "unsatisfactory personality" and his lack of critical ability. This appeal is from the action of the board in refusing to issue a license to him. *Held*, that the power of the board was not restricted in determining the general qualifications and fitness of candidates for teachers' licenses. Appeal dismissed.

Louis H. Hahlo, Acting Corporation Counsel, attorney for respondent.

FINLEY, Commissioner.—The appellant, J. F. Berry, is and has been since 1899, an assistant teacher in the high schools of the city of New York. On November 7 and 8, 1907, he took the written examination for a license as a first assistant teacher of mathematics in high schools. He passed the written examination and afterwards submitted to the practical and other tests required of candidates for such license. The board of examiners caused his work to be inspected and reports were obtained from a number of persons occupying supervisory positions and associated with the appellant in his work as a high school teacher. On January 5, 1909, the appellant was notified by the board of examiners that the license which he sought was withheld because of his failure to

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meet the required practical and oral tests. The report of the examiners showed that the refusal to grant the license was based on his "unsatisfactory personality" and his lack of critical ability.

The statement presented by the appellant shows that he frequently sought a reconsideration of the unfavorable report of the examiners during the years of 1909-1915. The board of examiners gave him a hearing on November 12, 1909, and failed to change its determination. In October, 1914, he sought a further review by the board of examiners and the board finally declined to issue the license.

He sought to obtain favorable action by the city superintendent of schools and subsequently submitted the matter to the board of education. He had frequent conferences with the president of the board and with several of the members thereof. His complaint was referred, in March, 1915, to the high school committee for action. On May 20, 1915, he was notified that his application for a review had been considered by the committee on methods of the board of examiners and it was reported that such committee had no jurisdiction.

The appellant appeals from the action of the board of education in refusing to direct the issuance of the license to him. The respondent contends that the board of examiners has entire control of the examination of applicants for licenses, and that an appeal does not, therefore, lie from the action of the board in refusing to direct the board of examiners to revise its ratings so that the license sought for by the appellant may be issued to him. The proper disposition of the case does not necessitate a determination of this question. It will be assumed, for the purpose of determining the appeal, that the appellant has properly submitted the question of the legality of the withholding of the license which he seeks.

It is provided in section 1089 of the Greater New York Charter that "A Board of Examiners is hereby constituted, whose duty it shall be to examine all applicants who are required to be licensed in and for the city of New York, and to issue to those who pass the required tests of character, scholarship and general fitness, such licenses as they are found entitled to receive."

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It is further provided in such section that "The Board of Examiners shall hold such examinations as the city superintendent may prescribe and shall prepare all necessary eligible lists, which shall be kept in the office of the city superintendent of schools and be open to inspection by members of the board of education, associate city superintendents and district superintendents, and local school boards."

The by-laws of the board of education direct that such examinations shall be conducted in accordance with the requirements fixed by the board of education and at such times as the city superintendent may direct, and that the city superintendent shall prescribe the subjects in which the candidates are to be examined and determine the percentage which shall be required in order to constitute a successful examination. See By-laws of Board of Education, § 68.

There is nothing in the charter or in the by-laws of the board which in any way restricts the power of the board of examiners in determining the general qualifications and fitness of candidates for teachers' licenses. It was the evident purpose of the statute to confer upon the board of examiners the responsibility of determining whether or not candidates for licenses were entitled to receive them. The rating of candidates upon written examinations and other tests is within the discretionary control of such examiners. As was stated by me in *Matter of the Appeal of Anna E. Hulbert*, decided March 24, 1916: "The duties of the board of examiners primarily relate to the determination of the character, scholarship and general fitness of applicants for licenses to teach in the city of New York. The proper performance of such duties necessarily depends upon personal knowledge of character, scholarship and general fitness of applicants, acquired by examiners after reasonable tests and examinations. The determination of the qualifications of a candidate for a license necessarily involves the exercise of discretion by the examiner."

The presumption will be in every case that the examiners have properly performed the important duty imposed upon them. It would be unreasonable to expect that the Commissioner of Education could substitute his judgment as to the general fitness of indi-

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vidual candidates for that of the examiners. There would be no justification for intervention upon appeal, except in a case where it was clearly shown by a great preponderance of evidence that a candidate had been subjected to gross mistreatment. There must be convincing proof of malice, bad faith or gross error, to justify the setting aside upon appeal of a duly considered determination by the board of examiners as to the qualifications, character and fitness of a candidate for a license.

It is not necessary to discuss the evidence submitted by the appellant on this appeal. It is sufficient to say that the testimony adduced is not of such a weight as to warrant setting aside the determination of the examiners as to the issuance of the license which the appellant seeks. The alleged misconduct and injustice toward the appellant on the part of the examiners are not established by specific instances, and the appellant has failed to show definitely that there is any warrant for intervention by the Commissioner of Education.

His appeal must therefore be dismissed.

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In the Matter of the Appeal of FRANK MILLER Relative to the  
Election of Trustees in District No. 7, Town of Lewis, Lewis  
County

Case No. 336

(Decided October 7, 1916)

In determining the question as to the qualifications of a person to hold a school district office, the fact that he is not a qualified elector of the district must be shown affirmatively.

Frank Miller, the appellant, is a resident and qualified elector of district No. 7, town of Lewis, Lewis county, and as such appeals from the proceedings of an annual meeting of that district held May 2, 1916, in electing Adolf Zierjin as trustee, and asks for his removal. The appellant alleges merely that the respondent is not a citizen of the United States, but there is no affirmative proof shown of this fact. It is not sufficient to assert merely that a person is not qualified as an elector; such fact must be affirmatively proved. As the respondent has served creditably as trustee for the past school year, there is a presumption in favor of his right to hold the office. Appeal dismissed.

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FINLEY, Commissioner.—The appellant, Frank Miller, is a resident and qualified elector of district No. 7, town of Lewis, Lewis county. He appeals from the acts and proceedings of the annual meeting of such district, held May 2, 1916, in electing Adolf Zierjin as trustee of such district and asks that he be removed from office. He alleges in his petition that "the said Adolf Zierjin is, and was at the time of his said election as trustee ineligible, not possessing the qualifications required by statute to constitute a person a voter at school meetings, in that he is not a citizen of the United States."

The law provides that every school district officer must be a qualified voter of the district. See Education Law, § 221. A person is entitled to vote at a school meeting for the election of school district officers and upon all other matters which may be brought before the meeting, if he possesses the qualifications prescribed in section 203 of the Education Law. A person is not a qualified elector who is not a citizen of the United States. Where a question is raised as to the qualifications of a person to hold a school district office, it must appear affirmatively that such person is not a qualified elector of the district. It is not sufficient to assert merely that the person is not a qualified elector of the district or that he does not possess one of the essential qualifications to constitute him a qualified elector.

The appellant alleges merely that the respondent is not a citizen of the United States. This is a mere conclusion of law and is insufficient in the absence of a positive statement of facts showing that the respondent is not a naturalized citizen. It appears from the records of this office that the respondent has served creditably as trustee for the past school year. There is a presumption in favor of his right to hold the office. The appellant has failed to produce proof of the allegation that the respondent is not a citizen, and for this reason his petition must be dismissed.

**The appeal is dismissed.**

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In the Matter of the Appeal of **NETTIE C. MILLER** Relative to the Payment of Certain Expenses Incurred by Her in Defending Proceedings Brought against Her as Trustee of School District No 10, Town of Columbus, Chenango County

Case No. 320

(Decided October 17, 1916)

**A school trustee who has been compelled to defend charges preferred against him to secure his removal from office is individually interested and must personally meet his reimbursements.**

A proceeding was instituted against the appellant, Nettie C. Miller, as trustee of school district No. 10, town of Columbus, Chenango county, to secure her removal from office. The proceeding was dismissed and appellant paid her attorneys personally. She then called a special meeting of the electors of the district to vote upon the question, among others, of reimbursing her for the expenses to which she had been subjected. The meeting adjourned without taking action upon the claim and this appeal is from such failure to act. *Held*, that in defending herself as trustee from being removed from such office the appellant was not within subdivision 15 of section 206 of the Education Law which provides for the voting of a tax to pay the reasonable expenses incurred by district officers in defending suits or appeals brought against them for their official acts; in protecting himself against proceedings based upon his alleged misconduct in office the trustee acts in his individual capacity and cannot be reimbursed for expenditures. Appeal dismissed.

Brown & Brown, attorneys for appellant.

Fuller & Truesdale, attorneys for respondents.

**FINLEY, Commissioner.**—It appears from the petition in this appeal, the allegations therein being admitted, that a proceeding was instituted before the Commissioner of Education against the appellant, Nettie C. Miller, as trustee of school district No. 10, town of Columbus, Chenango county, to secure her removal from office, under section 95 of the Education Law. The petition in such proceeding was dismissed and a decision filed therein June 19, 1915. Such proceeding was based upon certain alleged wrongful acts of the appellant as such trustee, all of which pertained to

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the performance of her official duties. The appellant paid the attorneys who defended her in such proceeding the sum of forty dollars. She called a special meeting of the qualified electors of the district to be held July 7, 1915, to vote upon the question, among others, of reimbursing her for the expenses incurred in defending the proceedings for her removal from office. The meeting adjourned without taking action upon the claim and this appeal was subsequently brought from such failure to act.

The appellant contends that the proceeding for her removal was brought against her because of acts performed by her in the transaction of the business of the district and for this reason the qualified electors of the district, at a district meeting, duly called for the purpose, were authorized to vote a tax to pay the reasonable expenses incurred by her in defending the proceedings. She relies upon subdivision 15 of section 206 of the Education Law which provides that a district meeting shall have power "to vote a tax \* \* \* to pay the reasonable expenses incurred by district officers in defending suits or appeals brought against them for their official acts." It has been held by the Court of Appeals that "appeals" here referred to mean appeals to the Commissioner of Education to review the official acts and proceedings of officers, boards and district meetings relative to school affairs, brought as provided by section 880 of the Education Law. A proceeding for the removal of a district officer is not an "appeal" within the meaning of the provisions regulating appeals to the Commissioner of Education. See *People ex rel. Light v. Skinner*, 159 N. Y. 162.

The reasonable expenses incurred by a trustee in defending a suit or proceeding in the courts against him in his official capacity or against the district, or in defending an appeal to the Commissioner of Education from his official acts may properly be paid to him under subdivision 15 of section 206 of the Education Law, above quoted, and upon a submission of the necessary facts, an order may issue on an appeal directing that such payment be made. But such provision may not be extended to proceedings against the trustee based upon his alleged misconduct. Where a



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trustee has been compelled to defend charges preferred against him to secure his removal from office, he is individually interested in the proceedings and disbursements therein are on his personal account. In defending such charges he is protecting his personal interest in the office and the district as such is not concerned therein. The provision above referred to is not sufficient to confer authority upon a district meeting to appropriate district funds to reimburse a trustee for expenses incurred in such defense. There may be no lawful expenditure of district money for other than a purpose. The power and duty to pay the expenses incurred by trustees in prosecuting or defending actions, proceedings and appeals must be conferred or imposed by statute, otherwise district money may not be used for such purposes. In the absence of authority in a district meeting to pay the expenses incurred by the appellant in defending the proceedings against her to deprive her of her office, the conclusion must be that she has no remedy by way of any appeal from the refusal or failure of the district meeting to direct the levy of a tax for the payment of such expenses.

The appeal is dismissed.

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In the Matter of the Appeal of HARRY McCARTNEY and Others  
from an Order Dissolving School District No. 2, Town of North  
Dansville, Livingston County, and Annexing the Territory  
Thereof to Union Free School District No. 1 of Such Town

Case No. 338

(Decided October 17, 1916)

A district superintendent is authorized to dissolve a district and to unite its territory to an adjoining district without the consent of the trustee of the dissolved district.

Harrison F. Colliater, district superintendent of schools of the third supervisory district of Steuben county, on April 16, 1915, executed an order dissolving school district No. 2, town of North Dansville, that county, and annexing its territory to union free school district No. 1 of

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that town. This appeal is from such action. Appellants alleged that no hearing was had and that the consent of the trustee of the district dissolved was not secured. The dissolution complained of was effected under section 129 of the Education Law, which authorizes a district superintendent to execute such an order as is here discussed without the consent of the trustee of the district dissolved. The order of dissolution and annexation is effectual under the statute at the time specified therein without further hearing or procedure. Appeal dismissed.

Charles D. Newton, attorney for appellants.

Harrison F. Collister, in person, for respondent.

FINLEY, Commissioner.—On April 16, 1915, an order was executed by Harrison F. Collister, district superintendent of schools of the third supervisory district of Steuben county, dissolving school district No. 2, town of North Dansville, of such county, and annexing the territory thereof to union free school district No. 1, of such town. The appellants are residents and taxpayers in the dissolved district, and complain of the difficulties, hardships and inconveniences occasioned by such order of consolidation.

Objection is made to the sufficiency and validity of the order in that the trustee of the dissolved district did not give his consent to the order, and that a hearing was not had before the district superintendent and the supervisor and town clerk of the town, as required by section 125 of the Education Law in a case where the consent of the trustees of districts to an alteration of the boundaries thereof is not obtained. The order appealed from recites that it was executed by the respondent district superintendent pursuant to the power conferred upon him by section 129 of the Education Law. This section authorizes a district superintendent to dissolve a district and to unite the territory thereof to an adjoining district without the consent of the trustee of the dissolved district, and the order of dissolution and annexation is effectual at the time specified therein, without further hearing or procedure.

The real question in controversy pertains to the educational advantages and interests obtained or promoted by the consolida-

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tion. If, as stated in the order, the educational interests of the community require the consolidation of the districts, the order must be sustained.

The dissolved district is situated northerly from the village of Dansville, which, for the most part, is located in union free school district No. 1. The schoolhouse in the dissolved district is about one and one-half miles from the high school in the village of Dansville. The highway connecting the two is either macadam or brick, and is nearly all within the village. The schoolhouse site is small, the building itself is old, poorly lighted and not equipped with modern appliances. There are about thirty children in the district, many of whom attend the village school, and for many years those who have completed the elementary grades have been compelled to pay tuition for their instruction in the high school at Dansville. The assessed valuation of the district is about \$130,000, while that of the union free school district is nearly \$2,000,000. The tax rate of the dissolved district for the year 1914-15 was \$2.38 on \$1,000, and that of the village district about \$10.50 per \$1,000.

There is no doubt as to the superior educational advantages derived from the school at Dansville. Such school is graded carefully; each teacher is specially trained and experienced; all of them are either college or normal school graduates or possessed of qualifications permitting them to teach in secondary or graded schools; the courses of instruction include vocational, agricultural and home making topics, and all other subjects of a good secondary school; ample provision is made for the physical training of the pupils, and the building and its equipment and appliances are ample in every respect to afford more than ordinary school facilities. The school formerly maintained in the dissolved district, according to the reports on file in this department and in the opinion of the district superintendent, who from experience and observation is qualified to bear witness as to such matter, was taught by inexperienced teachers, was poorly equipped, and not maintained as it should have been, considering the financial resources of the district.

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The effect of the order appealed from is to afford to all children of the dissolved district the free use of the superior educational facilities of the Dansville district. The additional cost to the taxpayers is not excessive, and the value of the increased school opportunities afforded by the strong, well organized and modernly equipped school at Dansville more than makes up for this difference in cost. All of the children who attend the Dansville school are being conveyed by covered automobile busses, which are operated for nearly the entire year, with no appreciable discomfort to the children. The children's attendance at the school in the consolidated district is and will be more regular and no more inconvenient, with such means of transportation, than was their attendance at the school in the dissolved district. In view of all these circumstances it is necessary to sustain the finding of the district superintendent that the educational interests of the community demanded the consolidation.

The contention of the appellants that since the order of dissolution and annexation imposes upon the taxable property of the dissolved district the tax burden of an outstanding bonded indebtedness, in the creation of which they had no voice, such order is an unconstitutional exercise of power in that it deprives them of their rights without due process, may not be sustained. Orders of consolidation having a like effect have been sustained, and the validity of the statute under which they have been issued has never been attacked in the courts.

The appeal must be dismissed for the reasons herein stated.

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In the Matter of the Appeal of FLORENCE BRABANT Relative to Her Employment as Teacher in School District No. 16, Town of Clayton, Jefferson County

Case No. 339

(Decided October 17, 1916)

**A verbal agreement to employ a teacher is enforceable on appeal but the burden of proof as to the making of such agreement rests upon the teacher alleging it.**

Florence Brabant, the appellant, is a licensed teacher and was employed to teach the school in district No. 16, town of Clayton, Jefferson county, for the years of 1915-16. John Ball, one of the respondents herein, was duly elected trustee of this district May 2, 1916. The morning after the school meeting the appellant called upon Mr. Ball and sought to secure the contract for teaching the school during the ensuing year. Her allegation is that Ball then agreed verbally to employ her as teacher. After appellant had called upon him Ball was notified of his election but refused to accept the office; subsequently Adelbert Wright was elected as trustee. This appeal is brought from the refusal of Wright to recognize appellant's alleged engagement by Ball as teacher. *Held* that the determination of the appeal depends upon the right of Ball to contract with the teacher at the time alleged and that Ball was authorized to make the contract on the day following the annual meeting but that appellant has failed to show that any such contract was made specifically complete as to terms of compensation and duration of time and without condition. Appeal dismissed.

John O'Leary, attorney for appellant.

George E. Morse, attorney for respondent.

FINLEY, Commissioner.—The appellant, Florence Brabant, is a licensed teacher and was employed to teach school in school district No. 16, town of Clayton, Jefferson county, for the school year of 1915-1916. John Ball, one of the respondents, was elected trustee of the district at the annual meeting held May 2, 1916. The appellant, upon receiving information of the election of Mr. Ball as trustee, applied by telephone for the position of

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teacher of the school of the district for the ensuing year, and on the morning after the school meeting called upon him for the purpose of entering into a contract to teach the school. The appellant alleges that on this occasion the respondent Ball agreed verbally to employ her as teacher, and brings this appeal from the refusal of the acting trustee of the district to recognize the contract and to permit her to teach the school.

It appears that Mr. Ball was declared elected as trustee at the annual meeting. He had not been notified of his election and stated to the appellant that he believed he had no right to execute a contract prior to notice of his election. After the conversation upon which the appellant relies to establish the contract, he was notified of his election as trustee and presented to the clerk of the district a written refusal to accept the office. A special meeting was thereafter called by the then trustee of the district to elect a trustee in place of the respondent Ball. Such meeting was held May 15, 1916, and Adelbert Wright was elected as trustee. The appellant notified Mr. Wright on May 16, 1916, that she had made a contract with Mr. Ball to teach the school in the district and that she considered herself the legal teacher and would insist upon her rights under such contract. Mr. Wright informed her by letter that Mr. Ball had told him that the contract was conditioned upon his continuing as trustee, and that since Mr. Ball had resigned he would not employ her as teacher of the school.

There is much discussion in the papers as to the power of the respondent Ball to contract with a teacher prior to notification of his election as trustee and to his acceptance of the office. The validity of the refusal of Mr. Ball to accept the office and of the subsequent election of Mr. Ball has been attacked. But the appellant's right to relief does not depend upon the effect of the refusal of Mr. Ball to continue as trustee nor are her rights effected by the subsequent election of Mr. Wright to that office. The determination of the appeal depends upon the right of the respondent, Ball, to contract with a teacher at the time the appellant negotiated with him for the position, and upon the sufficiency of

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the alleged conversation to constitute a valid contract between the parties.

The law requires the district clerk to notify each person elected to a school office of his election to such office. Education Law, § 228. This provision may not be construed so as to exclude from a school office a person duly elected thereto until the district clerk has notified him of his election. Immediately upon the election of a trustee in a district having a sole trustee, such trustee may enter into a contract with a teacher for the ensuing school year, although his term of office does not begin until the following first day of August. See Education Law, § 561. The respondent Ball was authorized to contract with the appellant as teacher on the day following the annual meeting, regardless of the failure of the district clerk to notify him of his election.

There is serious conflict of testimony as to the conversation between the appellant and the respondent, Ball, when she called upon him on the day following the annual meeting in relation to her contract for the ensuing year. The appellant alleges as follows: "That the next morning before school time she called at the residence of said John Ball, and asked him if he had considered her application. He replied 'That someone had to take it, and I might as well be trustee as anyone.' He asked me what wages I received and what wages the country schools generally paid. I replied that 'I had been getting \$12 per week, with janitor work done, and that country schools paid from \$10 per week up.' He replied 'He had not heard any complaints and he knew no reason why he should not let me have the school,' and finally he said, 'You can have the school.'"

The respondent denies positively that he told the appellant she could have the school, and also that he had stated that he would accept the office. He alleges that he told her that he did not intend to accept the office "and would pay a fine first," but admits that he told her "if he did accept the office and was trustee, that he knew no reason why he would not let her have the school." It is thus apparent that the material part of the alleged verbal contract upon which the appellant relies is denied. No other persons

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were present when the conversation took place, and there is no testimony, except that of the contesting parties, as to the transaction.

The statute relating to teachers' contracts requires a trustee who shall employ a teacher to teach to make and deliver to the teacher "a contract in writing," signed by the trustee, "in which the details of the agreement between the parties, and particularly the length of the term of employment, the amount of compensation and the time when such compensation shall be due and payable, shall be clearly and definitely set forth." Education Law, § 561. This provision imposes upon a trustee the duty of executing and delivering a written contract to teach, where he has employed or agreed to employ a teacher. A verbal agreement to employ a teacher is enforceable on appeal. But such agreement must be proven by competent testimony and it is incumbent upon the teacher who asserts that such an agreement was made to show by a preponderance of proof that it was specific as to compensation and duration of term, and was definite and unconditional.

The appellant states that no term of employment was mentioned. Her allegation that the trustee elect told her that she could have the school is denied by him, and there is no corroborating proof of such statement. The circumstances of the case show that the respondent contemplated a refusal to accept the office of trustee, and the facts adduced by him indicate quite clearly that he negotiated with her upon the condition that he retain such office. The appellant has failed to prove by preponderating evidence that the trustee made a definite and unconditional promise to employ her as teacher for the ensuing school year, and she is not entitled to the relief which she seeks.

**The appeal is dismissed.**



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**In the Matter of the Appeal of VAN CLIVE D. STILES from the  
Action of the State Teachers' Retirement Fund Board in Deny-  
ing His Request for Retirement**

Case No. 340

(Decided October 17, 1916)

**Reconsideration of appellant's application to the State Teachers' Retirement  
Fund Board for retirement refused.**

Van Clive D. Stiles, the appellant, has been a teacher in this State in the public schools for over twenty-eight years, and in October, 1913, applied to the State Teachers' Retirement Fund Board for retirement, but his request was denied by the board. In 1915 he requested a reconsideration of his application, but the board has taken no action in the matter. The appellant is fifty-eight years of age, and alleges that he has become unable to teach because of physical disability "caused by Bright's disease and other ailments and deafness." There being substantial reasons for denying appellant's request, the presumption follows that the reasonableness of the board's action may only be overcome by preponderance of proof. Appeal dismissed.

Anthony Helder, attorney for appellant.

FINLEY, Commissioner.—The appellant, Van Clive D. Stiles, has taught in the public schools of this state for a period of twenty-eight and one-half years. He applied to the State Teachers Retirement Fund Board for retirement in October, 1913, and his request was denied by the board at its meeting held April 25, 1914. He requested a reconsideration of his application, August 28, 1915, but the board has taken no further action in the matter.

The appellant alleges that he is fifty-eight years of age and that he has been unable to teach because of physical disability, "caused by Bright's disease and other ailments and deafness." No proof other than his own statement has been submitted by him as to his physical condition, nor are facts presented indicating that the board has exercised unfairly the discretion conferred upon it by the statute.

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The records of the Board disclose that there were substantial reasons for denying the appellant's request for retirement. A presumption exists in favor of the reasonableness of the board's action, which may only be overcome by preponderance of proof. In the absence of evidence showing that the board has exercised its discretion to the prejudice of the rights of the appellant, the determination of the board will be sustained.

The appeal is dismissed.

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In the Matter of the Appeal of CLAUDIA R. SWANEMAN from the Action of the STATE TEACHERS' RETIREMENT FUND BOARD in Denying her Application for Retirement and an Annuity

Case No. 341

(Decided October 25, 1916)

**Request for retirement and an annuity under State Teachers' Retirement Fund Law refused by the board.**

Claudia R. Swaneman, the appellant, on February 10, 1916, presented a request for retirement and annuity under the State Teachers' Retirement Fund Law. The Retirement Fund Board refused her request at a meeting held April 30, 1916, and has since declined to review its action. This appeal is from the refusal of the board to grant such retirement. At the time of her application the appellant was forty-seven years of age, had taught about twenty-six years, the last eighteen and one-half years in the Amsterdam public schools. She is married, lives with her husband, who is employed in an Amsterdam bank. The certificate of a physician accompanied her application, which certificate stated that she was suffering from laryngitis and pharyngitis, and that such disability was permanent. Other than this, it did not appear that she was permanently incapacitated for further service as a teacher. No unfair discrimination against appellant by the board has been shown, but, on the other hand, held that the board has exercised its discretion in refusing the request.

Where no sufficient reason for retirement is shown to exist, the Retirement Board may exercise its discretion, although the teacher has served more than twenty-five years. Appeal dismissed.

FINLEY, Commissioner.—The appellant, Claudia R. Swaneman, submitted a request for retirement and an annuity under

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the State Teachers' Retirement Fund Law, February 10, 1916. The State Teachers' Retirement Fund Board refused to grant such request at its meeting held April 30, 1916. The appellant has since sought a review of the action of the board, without success. The appeal is brought from the determination of the board, in accordance with the provisions of subdivision 4 of section 1109 of the Education Law.

The only question presented pertains to the physical condition of the appellant. It appears from her application that she was at that time forty-seven years of age and had taught for a period of about twenty-six years, the last eighteen and one-half years in the public schools in the city of Amsterdam. She is a married woman, living with her husband, who is employed in one of the banks of Amsterdam. Her application was accompanied by the certificate of a physician who stated therein that she was suffering from chronic pharyngitis and laryngitis and that such disability was permanent. It does not appear from such certificate or any other testimony produced in her behalf that she was permanently incapacitated for further services as a teacher.

The board carefully considered the facts presented in connection with her request for retirement and caused an examination of the applicant to be made by a physician designated by it. The appellant has not disclosed any unfair discrimination against her by the board, and it appears from the records of the board, which have been submitted to me for my inspection, that the board has exercised a reasonable discretion in refusing to grant her request for retirement.

It has been ruled upon appeal from determinations of the Retirement Board that such board may, in its discretion, refuse a request of a teacher for retirement, notwithstanding the service of the teacher for a period of twenty-five years, where in its judgment no sufficient reason for retirement is shown to exist. The determination of the board will not be disturbed on appeal unless it is shown by preponderance of proof that the board has exercised its discretion unfairly and to the detriment of the rights of the teacher. The appellant in this case has failed to show that the board in refusing to grant her request for retirement disre-

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garded material facts in support of such request or in any other way abused the discretion conferred upon it by the statute. The determination of the board will not be disturbed upon the facts presented in this appeal.

The appeal is dismissed.

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In the Matter of the Appeal of JOHN S. WITMER AND OTHERS from the Election of JOHN HUTCHINSON, JOHN W. MITCHELL AND CORNELIUS GALLAGHER as Members of the Board of Education of Union Free School District No. 4, Town of North Hempstead, County of Nassau, State of New York

Case No. 344

(Decided November 10, 1916)

The results of a school election must be sustained if the persons declared elected received a majority of all the legal votes cast for the offices to be filled, unless there is clear and positive proof of fraud, collusion or intimidation.

John S. Witmer, Jr., and nine others, all of whom are qualified electors of union free school district No. 4, town of North Hempstead, Nassau county, appealed from the election of John Hutchinson, John W. Mitchell and Cornelius Gallagher, as members of the board of education of that district, at the annual meeting held May 2, 1916. Three members of the board were to be elected at that meeting, the appellants Witmer, Keevil and Wysong on one ticket, and the respondents on the other ticket. Certain irregularities not vital are alleged as to the conduct of the election. There is no indication that the result of the election was not a fair expression of the will of the electors. There is no proof of illegal voting or of fraud in the canvass of the votes. The respondents Hutchinson and Mitchell received a majority of all the votes cast and their election must be sustained. As to the election of respondent Gallagher, since he received a majority over the appellant Witmer, who received more votes than the other candidates on his ticket, Gallagher was also elected. Appeal dismissed.

Albert E. Gunn, attorney for appellants.

Thomas R. Fay, attorney for respondents.

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FINLEY, Commissioner.— The appellants, John S. Witmer, Jr., Arthur W. Keevil, Charles N. Wysong, William H. Olandt, William D. Chipp, John D. Clay, John E. Bullard, Montroville Smith, Adelbert Van Wicklen and William Fearson, are qualified electors of union free school district No. 4, town of North Hempstead, Nassau county. They appeal from the election of John Hutchinson, John W. Mitchell and Cernelius Gallagher, as members of the board of education of such district, at the annual meeting held May 2, 1916. It appears that three members of the board were to be elected at such meeting for full terms of three years. The appellants, Witmer, Keevil and Wysong were candidates for such positions in opposition to the respondents, Hutchinson, Mitchell and Gallagher. The qualified electors of the district attended the meeting in large numbers, and there was great interest shown in the election of the members of the board. The tickets were printed, the names of the appellants Witmer, Keevil and Wysong being on one ticket and those of the respondents on the other. No other candidates were voted for at the election. There were 758 ballots cast by the qualified electors present, of which Mr. Hutchinson received 401, Mr. Mitchell 391, and Mr. Gallagher 373, and upon announcing the result of the ballot they were declared elected.

The appellants allege certain irregularities in the conduct of the election, which they contend invalidate it, and they ask that it be set aside and that a new election be ordered. Many of the alleged irregularities are not vital and do not appear to have had any bearing upon the result of the election or to have prejudiced the rights of the appellants. For instance, it is contended that the meeting was not called to order until 8:15 P. M., while the notice stated that the meeting would be held at 8 P. M., and that such notice and the calling of the meeting to order at 8:15 P. M. was in violation of the law, which provides that the annual meeting shall be held "at seven-thirty in the evening." Education Law, § 194. This provision is not mandatory in the sense that every annual meeting held at a later hour in the evening is invalid. If it does not appear that the delay in the opening of the meeting

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affected adversely the rights of the parties, the failure to comply with the provision will be disregarded. It appears that the ballots were printed on different kinds of paper, and that a teller favorable to the respondents took all the ballots from the voters and deposited them in the ballot-box. It is insisted that such teller was thus able to discover the candidates voted for by each voter, "tending to intimidate and influence the voters, and to prevent the expression of a free opinion, and that thereby the secrecy of the ballot was not preserved." No proof of actual intimidation is presented. The law does not require ballots to be uniform and contains no provision that the ballots shall be secret. It is improper for an officer of a meeting to open and examine ballots cast by electors, prior to their deposit in the ballot box. Such conduct on the part of a teller is reprehensible, but unless it appears that the result of the election was affected, it will not be set aside because some of the ballots were opened when cast and read by one of the tellers without protest by the electors casting such ballots, or by others present and observing such conduct.

It is alleged that challenges were made by some of the appellants which were not accepted. But the proof discloses that no formal challenge was made by any of the appellants, and that only in one case was it insisted by any of them that a voter had no right to vote. Even if this alleged challenge had been accepted it would not have changed the result of the election, and the failure to conform to the requirement would not, of itself, be sufficient to justify setting aside the election.

Perhaps the most serious of the alleged irregularities pertains to the appointment of the inspectors or tellers. The appellants present proof that the chairman of the meeting appointed two inspectors without being authorized to do so by motion or direction of the meeting. The law provides that at an election of school district officers, "Two inspectors of election shall be appointed in such manner as the meeting shall determine." Education Law, § 227. The usual procedure is for the meeting either to elect such inspectors or to direct by motion or resolution that the chairman appoint them. Assuming that the chairman did appoint the inspectors without being authorized by the meeting to do so, there

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was no protest upon the part of any elector present and the acquiescence in the appointment may be regarded as a determination that such inspectors be appointed by the chairman. The persons so appointed as inspectors, having been permitted to serve as such without protest, will be deemed *de facto* inspectors and the validity of the election is not impaired by the performance by them of the duties of such officers.

The election of the respondents must be sustained if they received a majority of the legal votes cast for the candidates for the offices to be filled, unless there is clear and positive proof of fraud, collusion or intimidation indicating that there was not a fair expression of the will of the electors present. The appellants have not attempted to establish specific acts of fraud or intimidation. There are suggestions of collusion between the officers of the meeting to bring about the election of the respondents, but there is no proof tending to show that the alleged misconduct affected in any way the result of the election. There is no proof of illegal voting or of fraud in the canvass of the votes.

The count of the ballots cast showed that the respondents Hutchinson and Mitchell received a majority of all the votes cast, and their election was declared legal, and must be sustained. It appears that there were 758 ballots voted by the electors, 349 of which contained the names of the respondents Hutchinson, Mitchell and Gallagher, and 333 the names of the appellants Witmer, Wysong and Keevil; the remaining 76 ballots were split ballots, so-called, either containing the names of some one or more of the rival candidates in place of those eliminated, or having some of the names of the candidates erased. The law provides that "the persons having the majority of votes respectively, for the several offices, shall be elected." Education Law, § 227, subd. 5. This provision must be construed as requiring a candidate to receive a majority of the votes cast for all the candidates for the same office. Blank ballots are to be excluded in determining which candidate has received a majority. There were three trustees to be elected for full terms, and two tickets each containing the names of three candidates. The record does not disclose how

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many blank ballots were cast, or how many ballots were cast with less than three names on them. It is obvious that there were a considerable number of such ballots. Applying the rule that a majority consists of a majority of the votes cast for the respective candidates to the case under consideration, and assuming, as we must, that the three candidates on one ticket were opposed, respectively, to the three candidates on the other ticket, it must be decided that since the respondent Gallagher received a majority over the appellant Witmer, who received more votes than the other candidates on this ticket, the said Gallagher was also elected.

The appeal is dismissed.

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In the Matter of the Appeal of JULIUS C. LAKIN, one of the Trustees of School District No. 14, Town of Hancock, Delaware County

Case No. 346

(Decided November 14, 1916)

Where the minutes of a school meeting show that a vacancy as trustee was filled by the election of a new trustee, it must be presumed that the former trustee resigned prior to the election of the new trustee.

District No. 14, town of Hancock, Delaware county, is a common school district with three trustees. The appellant's term expired August 1, 1916, and at the annual meeting held May 2, 1916, he was re-elected for a full term of three years. At this meeting a controversy occurred, and the appellant alleges that Mr. O'Rourke, one of the trustees, resigned as such trustee at such meeting. Mr. O'Rourke alleges that he did not resign. There is a sharp conflict of testimony as to this fact, but it appears that the appellant, Julius C. Lakin, was elected trustee to fill a vacancy and, as the only vacancy was that occasioned by the alleged retirement of Mr. O'Rourke, it must be held that he did resign at the meeting in question. Appeal sustained as to election of Mr. Lakin, but as to all other matters such appeal is dismissed.

The contracts with the school teachers of the district, executed by L. W. Hoag and P. E. O'Rourke, acting as trustees thereof, legalized.

Vincent N. Elwood, attorney for appellant.

Frank A. Taylor, attorney for respondents.



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FINLEY, Commissioner.— School district No. 14, town of Hancock, Delaware county, is a common school district having three trustees. The appellant's term expired August 1, 1916, and he was re-elected for a full term of three years at the annual meeting held May 2, 1916. It appears that one of the trustees, Mr. P. E. O'Rourke, was engaged in business in the city of Binghamton and contemplated moving from the district. A controversy arose at the annual meeting in respect to the purchase of coal for the school during the preceding year in which it was claimed that Mr. O'Rourke was interested. The appellant alleges that Mr. O'Rourke thereupon resigned his office as trustee at such meeting. The parties are not agreed as to the form of the resignation. The appellant and twelve of the qualified electors swear positively that the appellant, who was chairman of the meeting, asked Mr. O'Rourke what he intended to do about resigning and that he replied "I resign." Mr. O'Rourke states that he did not resign at the meeting "and no offer of a resignation was either made or accepted by the meeting, or any action taken thereon at said meeting." The minutes of the meeting contain no reference to the resignation although it appears therefrom that the vacancy was filled by the election of Julius C. Lakin, all of the qualified electors present participating in such election. Mr. Lakin asserts that he was elected to fill the vacancy when it was created by the subsequent resignation of Mr. O'Rourke.

Notwithstanding the unfortunate conflict of testimony which may have arisen from the confusion at the meeting, it seems established by the preponderance of proof that Mr. O'Rourke actually resigned at the meeting. If this were not the case it is difficult to understand the subsequent action of the meeting in filling the vacancy. It is clear that the meeting had no legal power to fill a vacancy which did not exist at the time, and there is a strong presumption on this account that a vacancy was created by the resignation of Mr. O'Rourke. Moreover the minutes of the meeting show that the vacancy caused by the resignation of Mr. O'Rourke was filled by election at the annual meeting and that twenty-five voters voted at the election. Mr. O'Rourke himself is recorded in the minutes of the meeting as having voted

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to fill such vacancy. His action in so voting must be accepted as evidence that he had resigned. It must therefore be ruled that Mr. Julius C. Lakin was elected as trustee of the district to fill the vacancy caused by such resignation, to take effect from the date of the meeting.

A further question is at issue pertaining to the employment of teachers by Mr. Hoag, one of the trustees, and Mr. O'Rourke, after his resignation and the election of his successor. There are two teachers employed in the school of the district, with whom contracts were made on May 23, 1916, signed by the respondents O'Rourke and Hoag. It is contended that such contracts are illegal since Mr. O'Rourke was not a trustee at that time, and for the further reason that the appellant was not notified of the meeting. It should be noted that the teachers were acting in good faith in entering into such contracts and that they had reason to believe that the two trustees were authorized to make such contracts. Such contracts should therefore be sustained unless absolutely void because of a failure to comply with a positive statutory requirement. Mr. O'Rourke claimed to be a trustee of the district, and his successor, Mr. Julius C. Lakin, states that he did not at that time consider himself a trustee, for, as he understood the circumstances, a vacancy did not yet exist in that office. Mr. O'Rourke was therefore *de facto* trustee of the district at the time the contracts were made and was then authorized to execute the contracts. The facts adduced are not sufficient to show that the appellant had received no legal notice of the meeting at which such contracts were authorized. Such contracts may not therefore be set aside on the ground that such meeting was not called upon notice to the appellant as required by section 273 of the Education Law.

The appeal is sustained as to the election of Mr. Lakin but as to all other matters such appeal is dismissed.

It is hereby ordered that the action of the annual meeting in school district No. 14, town of Hancock, Delaware county, in electing Julius C. Lakin as trustee of such district to fill the vacancy caused by the resignation of P. E. O'Rourke, be and the same hereby is confirmed and declared valid; and

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It is hereby further ordered that the contracts with Mrs. Elizabeth Lakin and Genevieve Johnson as teachers of the school of such district, executed by L. W. Hoag and P. E. O'Rourke, acting as trustees thereof, pursuant to a resolution adopted by them at a meeting of the board of trustees on May 23, 1916, be and the same hereby are legalized.

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In the Matter of the Appeal from the Order of the DISTRICT SUPERINTENDENT OF THE SECOND SUPERVISORY DISTRICT OF SCHOHARIE COUNTY, Dissolving School District No. 6, Town of Schoharie, in such County, and Annexing the Territory Thereof to School District No. 5, Town of Esperance in Such County

Case No. 348

(Decided November 14, 1916)

The Commissioner of Education has power to direct the proper filing of an order made by a district superintendent of schools, where it appears advisable to do so.

The failure to file the order as required does not prevent a determination of an appeal upon the merits.

On July 26, 1916, Wellington E. Van Wormer, then the district superintendent of schools of the second supervisory district of Schoharie county, executed an order, taking effect immediately, dissolving district No. 6, town of Schoharie, in that county, and annexing its territory to school district No. 5, town of Esperance, in such county. Van Wormer's term expired July 31, 1916, and the basis of his order was declared to be "for the best educational interests of the community." The trustees of district No. 6, and a number of the respondents and taxpayers of that district and also of district No. 5, town of Esperance, are the appellants herein. No answer was filed by the respondent, he being no longer in office. The present district superintendent and the trustees of district No. 5, Esperance, have not appeared. The appellants contend that the order of July 26, 1916, is not valid because not properly filed in the town clerk's office, as required by section 122 of the Education Law. The ordinary presumption that a district superintendent, in dissolving a district and annexing its territory to an adjoining district, was promoting the educational interests of the two districts, is weakened in this case by the fact that the order was executed without consultation with the parties affected thereby, and after the respondent's successor had been elected and immediately prior to the expiration of his term of office.

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*Held*, that on the merits the order in question should be vacated. Some recommendations made by the Commissioner, however, as to organizing in this community a strong consolidated district.

The Commissioner of Education has power to direct the proper filing of an order of consolidation made by a district superintendent so that it may be effective. The failure to file the order as so required does not prevent a determination upon appeal of the questions upon the merits.

Wallace H. Sidney, attorney for appellants.

FINLEY, Commissioner.—Wellington E. Van Wormer, former district superintendent of schools of the second supervisory district of Schoharie county, executed an order on July 26, 1916, taking effect immediately, dissolving school district No. 6, town of Schoharie, county of Schoharie, and annexing the territory thereof to school district No. 5, town of Esperance in such county. The term of office of District Superintendent Van Wormer expired July 31, 1916. He states in his order that the consolidation of the two districts is for the best educational interests of the community.

The trustee of district No. 6, town of Schoharie, and a number of the residents and taxpayers of such district and also of district No. 5, town of Esperance, have appealed from such order. The respondent, being no longer in office, has not served and filed an answer to the petition. The present district superintendent and the trustees of district No. 5, town of Esperance, to which the territory is annexed, have not appeared and do not therefore insist that the order should be sustained. It is contended by the appellants that the order of the former district superintendent is not valid because not filed in the office of the town clerk as required by section 122 of the Education Law. It is provided in this section that the order of a district superintendent forming a school district shall be filed with the town clerk of the town in which the district is located. This requirement applies to an order dissolving a district and annexing the territory thereof to an adjoining district. The effect of such an order is to form a new district out of the territory of the dissolved district and of the district to which the dissolved district is annexed, and such order does not become effective until filed in the office of the

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town clerk. It follows, therefore, that the order appealed from will not be effective until so filed. The Commissioner of Education has power to direct the proper filing of such an order in a case where it appears advisable to do so. The failure to file the order as so required does not prevent a determination of this appeal upon the merits.

The allegations of the petition and the affidavits annexed thereto, being unopposed, must be accepted as true statements of the facts. There would be a presumption ordinarily that a district superintendent in dissolving a district and annexing the territory thereof to an adjoining district was promoting the educational interests of the districts affected. This presumption is weakened somewhat by the fact that it was executed without consultation with the parties affected thereby, after the respondent's successor had been elected and immediately prior to the expiration of his term of office.

Proof is presented indicating that there is no special demand at the present time for the establishment of a central school in district No. 5, Esperance, for the purpose of giving instruction in advance of the elementary grades. The children of the community are not far distant from the villages of Schoharie and Cobleskill, in which strong secondary schools are maintained.

This community appears to be one in which a strong consolidated district might be established which would enable the school authorities to maintain a graded elementary school, affording more practical courses of study, more efficient instruction and at less expense to the taxpayers of the community than it now costs to maintain the several separate schools which are maintained. Before such district is established, there should be a general understanding between the district superintendent and the leading people whose interests are affected as to the territory which may properly be included in such district. There should also be a manifest desire on the part of the citizens residing in the principal district to enlarge and improve their school facilities. The subject is commended to the consideration of the present district superintendent. The appeal will therefore be sustained and the order in question consolidating the districts vacated with-

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out prejudice to the right of the district superintendent to institute proceedings *de novo* for the consolidation of districts in this community.

The appeal is sustained.

It is hereby ordered that the order of Wellington E. Van Wormer, district superintendent of schools of the second supervisory district of Schoharie county, dissolving school district No. 6, town of Schoharie, Schoharie county, and annexing the territory thereof to school district No. 5, town of Esperance in such county, executed July 26, 1916, be and the same hereby is set aside.

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In the Matter of the Appeal of EVAN A. RESIDE from the Proceedings of the Annual Meeting Held in District No. 2, Town of Colchester, Delaware County, on May 2, 1916

Case No. 334

(Decided November 20, 1916)

The trustee of a school district has the legal authority under subdivision 19, section 275, of the Education Law to establish a branch school.

School district No. 2, town of Colchester, Delaware county, held an annual meeting on May 2, 1916, at which a resolution was adopted directing the trustee to lease a building to be erected by Corbett & Stuart, who own and operate an acid factory at a village known as Corbett, on the southerly portion of the district. Of the seventy pupils attending the district school, about twenty live near the present school-house, while the remainder live in or near Corbett. The proposed new building and the present school-house are on opposite sides of the Delaware river and are more than a mile and a half apart. The appellant, in behalf of himself and others near the present school-house, appeal from the action of the meeting in attempting to establish the district school at Corbett. Under sections 206, subdivision 7, 459 and 460 of the Education Law, the site of a school-house cannot be changed except by a majority vote of the legal voters present and voting at a district meeting adopting a resolution designating the new site and describing it by metes and bounds. Appeal sustained as far as it pertains to the designation of a new site.

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Edward E. Conlon, attorney for appellant.

Channing Garrison, respondent in person.

FINLEY, Commissioner.—At the annual meeting held in school district No. 2, town of Colchester, Delaware county, on the 2d day of May, 1916, a resolution was adopted directing the trustees to lease a building to be constructed in the vicinity of a manufacturing plant by the owners thereof, for a term of five years at the rate of \$100 per year. The resolution also directed that the trustees conduct a two-room graded school in such building, and that "he shall not conduct a school in the present school building during the term of the lease, except upon the vote of the district directing him to do so." It appears that Corbett & Stuart, who agreed to erect and equip the building for school purposes, are the owners and operators of an acid factory in the southerly portion of the district, at a village known as Corbett. The company employs a considerable number of persons, all of whom live in the vicinity of the factory. Seventy pupils were registered in attendance at the school in the district during the past school year, about twenty of whom live in the vicinity of the present school-house, while the remainder live in or near the settlement at Corbett. The present school-house is located on the opposite side of the Delaware river from the Corbett settlement, and somewhat more than a mile and a half distant.

The appellant resides near the present school-house, and in behalf of himself and others in that vicinity appeals from the action of the meeting in attempting to establish the school of the district in the building to be provided by the owners of the acid factory at Corbett.

The obvious effect of the resolution from which the appeal is brought is to abandon the present school building in the district and to change the school site to that of the building proposed to be erected for the use of the district. The law provides that the site of a school-house may not be changed unless a majority of the legal voters present and voting at a district meeting shall adopt a resolution designating the new site and describing it by

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metes and bounds. See Education Law, § 206, subd. 7; Id. §§ 459, 460. The resolution directing the change of the location of the school of the district was therefore invalid and must be set aside, so far as it pertains to the designation of a site for the school of the district.

The papers in this case show that there are about forty children in the vicinity of Corbett and from fifteen to twenty in the vicinity of Colchester. Corbett is located in one end of the district. If the school is maintained at Corbett several of the children would be compelled to travel from two and one-half to three and one-half miles and to pass the school-house at Colchester on their way to and from school. If the school is maintained at Colchester many of the children at Corbett will have less than a mile to walk, and none of them more than one and one-half miles, to attend school. It is obviously improper to establish and maintain a permanent school at Corbett. The proper course to pursue in this case is either to modify the present building so as to meet the needs of the district or to erect a new building and locate it with proper reference to the distance therefrom of the residences of the children in the district. This subject should have the consideration of the district superintendent having jurisdiction, to the end that there may be a proper and satisfactory adjustment of the question. The temper of the people appears to be such that, under the guidance of the district superintendent, an amicable adjustment may be reached.

Pending this adjustment, it seems proper that a branch school should be maintained at Corbett and the trustee of the district has the legal authority under subdivision 19, section 275 of the Education Law, to establish such branch school. The trustee should therefore proceed to carry out so much of the instruction which he received at the meeting as to provide temporarily for the establishment of a branch school at Corbett.

The pleadings in the case further suggest that there is some question as to the permanency of the business interests in Corbett, which, of course, will affect the number of children residing in that end of the district. If the industries located in that portion of the district should be discontinued or removed, the number of



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children therein desiring school facilities will be decreased accordingly. In such case the present school-house would undoubtedly be ample for all the needs of the district. The trustee may therefore make any necessary arrangement with Corbett & Stuart for the lease of the building erected by that company and the trustee may also provide for the equipment of the same to make it a suitable place for the occupancy of a temporary school.

The appeal herein is sustained.

It is hereby ordered that so much of the resolution adopted at the annual meeting in district No. 2, town of Colchester, Delaware county, on May 2, 1916, as directs the trustee to abandon the present school in such district be and the same hereby is set aside, and the trustee of said district is hereby directed to open and maintain school in the present school building owned by such district, and to take such action as may be authorized by law in respect to the establishment, equipment and maintenance of a branch school at Corbett in such district.

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In the Matter of the Appeal of JACOB OCKERS from an Order Dissolving School Districts Nos. 7 and 8, Town of Islip, Suffolk County, and Forming a New District out of the Territory Thereof

Case No. 342

(Decided November 20, 1916)

Where the school population of a district is many times greater than that of an adjoining district, the improvement of conditions in the larger district will promote the educational interests of the whole community and hence of the small district.

This appeal is taken from the action of J. Henry Young, district superintendent of schools for the second supervisory district of Suffolk county, in ordering the dissolution of school districts Nos. 7 and 8, town of Islip, Suffolk county, and forming a new district out of the said districts to be known as district No. 7 of that town. One of the old districts is very wealthy but contains few taxpayers, the adjoining district has a much

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lower assessment but many times the population. The tax rate of the two districts differs widely. *Held*, that these districts should be consolidated for the educational interests and welfare of the citizens of both districts. Appeal dismissed.

Joseph Wood, attorney for appellant.

Ralph C. Green, attorney for respondents.

FINLEY, Commissioner.—J. Henry Young, district superintendent of schools for the second supervisory district of Suffolk county, executed an order, taking effect November 1, 1915, dissolving school districts Nos. 7 and 8, town of Islip, Suffolk county, and forming a new district out of the territory of such dissolved districts, to be known as school district No. 7 of such town. The appellant, Jacob Ockers, is sole trustee of dissolved district No. 7, Islip, to be hereinafter designated as the Oakdale district, and the respondents are the trustees of dissolved district No. 8, Islip, to be hereinafter designated as the Bohemia district. The appeal is brought by direction of a vote of the qualified electors of the Oakdale district at a special meeting called for such purpose.

The order from which the appeal is brought was executed under and pursuant to sections 121 and 129 of the Education Law, the former of which authorizes a district superintendent to "organize a new school district out of the territory of one or more school districts which are wholly within his supervisory district, whenever the educational interests of the community require it." The appeal brings up for consideration and determination the sole question as to whether the educational interests and welfare of the entire territory embraced within the new districts will be promoted by the consolidation of the two districts.

The issues are defined clearly and there is no confusion as to the facts. The Oakdale district contains taxable property valued at \$1,840,190 (school year of 1914-1915), about ninety per cent of which is owned by three taxpayers and consists of exceedingly valuable and extensive estates situated along the shore of Great

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South Bay and its tributaries. The permanent residents are for the most part employees of the owners of such estates. The Bohemia district joins the Oakdale district to the north and lies back from the shore and the land is comparatively of small value. The assessed valuation of the district is about \$300,000. Nearly all the residents are laboring men and mechanics, living in the village of Bohemia, employed in the manufacture of cigars or upon large estates in the vicinity. There are about thirty children in the Oakdale district, while the Bohemia district has one hundred and sixty-seven. The average daily attendance, during the school year ending July 31, 1915, in the Oakdale district was twenty-two, and in the Bohemia district it was ninety-five. Two teachers are employed in the Oakdale school and three in the Bohemia school. The tax rate in the former district for the school year of 1914-1915 was about eighty cents on \$1,000, and in the Bohemia district it was \$10 on a \$1,000.

The situation thus described presents a case of clear inequality in the tax burden imposed upon districts which are substantially a part of the same community. It illustrates emphatically one of the most noticeable defects of school administration under existing laws, for the remedy of which various proposals have been submitted from time to time. While it may be stated as a general proposition that controversies as to school boundaries involving the transfer of territory from one school district to another should not be based solely upon the ground of equalizing the tax burdens, it is also well established that the extension of the tax unit by annexation or consolidation is justified where it results in equalizing the expense to be borne for the support of the schools by the taxpayers of the community.

It is insisted by the appellants that they and the other taxpayers of the Oakdale district have no interests in common with those of the Bohemia district, and that for such reason, among others, the district should not lose its identity and should be permitted to continue in control of the school which is needed for the proper instruction of the children of their district. It is apparent that the distance between the school at Oakdale and the school at Bohemia is great enough to warrant the maintenance of

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two schools for the convenience of the children of both villages, and there are a sufficient number of the children in both to make it advisable, perhaps, to maintain both schools. This fact does not, however, affect the wisdom or desirability of consolidation for the purpose of equalizing the burden of school maintenance. The valuable property in the Oakdale district should be charged with the support of the schools within a reasonable distance therefrom. Under conditions existing prior to the consolidation such property was only required to contribute a nominal amount for the maintenance of the public schools of the vicinity, while the taxpayers of the Bohemia district, considering their financial resources, were required to meet an excessive tax burden for such purpose.

It is apparent that the Bohemia district is doing all that may be reasonably expected of it for the large number of children to be instructed. The records of this Department show that the facilities afforded for the instruction of the children in the Bohemia district are much less satisfactory than those furnished for the much fewer children in the Oakdale district. The school population of the Bohemia district is many times greater than that of the Oakdale district. It is therefore obvious that the improvement of school conditions in the Bohemia district will promote the educational interests of the entire community taken as a whole. The consolidation will give greatly increased financial strength to the Bohemia district, which will result in the substantial improvement of school accommodations afforded a large majority of the children of the community. The district superintendent evidently had this in mind when he executed the order consolidating the two districts. In view of this condition it seems to be established that the consolidation is "for the educational interests and welfare" of the children of the territory formerly comprising the dissolved districts.

The consolidation will relieve the taxpayers of the Bohemia district to a material extent in what has been to them a serious tax burden. Because of the great assessed valuation of the Oakdale district the additional cost of school maintenance caused by the consolidation will not increase largely the tax rate in the

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Oakdale district. The consolidation will therefore bring about a more equitable distribution of the cost of school maintenance upon the taxable property which should be subjected naturally to such burden. The probable immediate result of the consolidation will be greatly increased educational opportunities for the 160 or more schools children in the Bohemia district. The school at Oakdale may be continued, notwithstanding the consolidation, so as to afford the children of that community the school advantages which their circumstances demand. The appellant has failed to establish his contention that the educational interests and welfare of the two districts will not be promoted by the order of the district superintendent, and therefore such order must be sustained.

The order of consolidation forms a new district out of the territory of the dissolved districts, to be known as school district No. 7, town of Islip, Suffolk county. It is incumbent upon the district superintendent to call a meeting of the qualified electors of the consolidated district, as provided in sections 190 and 191 of the Education Law, for the purpose of organizing the new district by the election of district officers. The first meeting so held should elect a trustee or a board of three trustees, and a district clerk and collector. Proceedings should thereupon be taken by the trustees, as provided in sections 141-145, inclusive, of the Education Law, for the organization of a union free school district. After such organization is effected, provision should be made for a fair representation from the Oakdale district upon the board of education of the union free school district, and this Department will take such action as may be necessary and legal to carry into effect such provision.

The appeal is dismissed.

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**In the Matter of the Appeals from the Order of J. M. BONNER,  
District Superintendent of Schools of the Second Supervisory  
District of Oswego County, Dissolving Districts Nos. 1, 2, 6 and  
9, of the Town of Williamstown in Such County and Creating  
a New District out of the Territory of Such Districts**

**Case No. 347**

(Decided November 20, 1916)

**The elimination of three small ungraded elementary schools, one of inferior standards, and the substitution therefore of a graded department school approved.**

School districts Nos. 1, 2 and 9, town of Williamstown, Oswego county, and union free school district No. 6 of that town, were, on April 28, 1915, dissolved by the district superintendent of schools of the second supervisory district of Oswego county, and in place thereof district No. 1, town of Williamstown, Oswego county, was organized. The majority of the qualified electors of the dissolved districts have joined in this appeal. Districts Nos. 1, 2 and 9 are ordinary common school districts each with one teacher and inadequate buildings. Five teachers are now employed in the four dissolved districts; in the consolidated district four teachers will be sufficient, even for the operation of two or more years of high school work. Under the facts in this case the proposed change is justified. Appeal dismissed.

Davies, Johnson & Wilkinson, attorneys for appellants.

F. G. Whitney, attorney for respondent.

FINLEY, Commissioner.— On April 28, 1915, J. M. Bonner, district superintendent of schools of the second supervisory district of Oswego county, executed an order dissolving school districts Nos. 1, 2 and 9, town of Williamstown, Oswego county, and union free school district No. 6 of such town, and out of the territory thereof created a new district to be known as school district No. 1, town of Williamstown, Oswego county. Separate appeals from such order have been brought by the trustees of districts Nos. 1, 2 and 9, in behalf of a majority of the qualified electors

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of such districts. The decision herein will determine the questions raised in each appeal.

The order complained of was executed under section 129 of the Education Law, which authorizes a district superintendent to dissolve one or more school districts and to form a new district from the territory thereof. He was not required under this section to obtain the consent of the trustees of the several districts, nor is the validity of the order affected by the fact that a majority of the qualified electors of the three districts represented by the appellants are opposed to the dissolution and consolidation.

It is apparent that the respondent district superintendent had in mind the abandonment of the three schools maintained in such districts and the establishment and maintenance of a central school for the consolidated district in the unincorporated village of Williamstown. He states in his order that the dissolution of such districts and their consolidation will be to the educational advantage of the dissolved districts. The respondent has, in ordering the consolidation of the districts, attempted to conform to the established policy of the State, of centralizing school facilities in our rural communities by eliminating weak and inefficient schools where it will be to the educational advantage of the children of the community and may be accomplished without serious hardship to them. This policy has been approved by the Department and has been declared by legislative enactment.

The appellants may not, therefore, complain properly of the arbitrariness of the consolidation order if it appears that the educational advantages and school facilities for the children in the dissolved districts will be promoted by affording them the privileges of a stronger and better organized central school, so located that they may attend such school without serious inconvenience. The fact that many of the children in the dissolved districts will be required to travel a greater distance to attend the central school than would be required of them if the schools in such districts were continued, does not control necessarily the disposition of this case. It is obvious that any attempt to carry out the policy of consolidation will result in increasing the distances that some of the children in the territory affected by the consolidation are

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required to travel in attending school. If the increased distances do not result in substantial hardship, incommensurate with the increased school facilities to be afforded by the central school, the order of consolidation ought not to be set aside upon this ground.

It should be noted in this connection that decisions rendered upon certain former appeals from orders dissolving and consolidating school districts were rendered prior to the establishment of the present policy of consolidation. Under the provisions of chapter 129 of the Laws of 1913, amending the Education Law so as to provide for the consolidation of districts by the vote of qualified electors, and the amendment of section 134 of such law by chapter 101 of the Laws of 1914, giving to districts consolidated by district superintendents as provided in section 129 of the Education Law, the district quotas formerly apportioned to the dissolved districts, it is competent to bring about the consolidation of districts either by the consent of the qualified electors thereof or by order of the district superintendent, where in his opinion it is advisable to do so for the benefit of the children in the districts to be consolidated. These statutes were not in force at the time the decisions relied upon by the appellant's attorneys were rendered and do not, as has been frequently held in more recent decisions, affect the determination of an appeal from an order of consolidation where it appears that such order will result in improved educational conditions. The order of consolidation herein appealed from must be sustained if the facts presented show that the maintenance of a central school by the consolidated district will afford additional and improved school facilities for the children of the community, without serious inconvenience or hardship and without unreasonably increased financial burden.

There is no material conflict as to relevant facts. Districts Nos. 1, 2 and 9 are ordinary common school districts, each maintaining a school with one teacher, in buildings constructed without regard to the present standard of school sanitation, ventilation and equipment. The records of this Department show that no substantial improvements have been made in recent years in the school buildings in such districts. All such school buildings are well below



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the average of those maintained in rural school districts. If proper and adequate school accommodations are to be afforded to the children of such districts, it would be imperative within a comparatively short time to alter extensively or to rebuild the school buildings in some, if not all, of these districts, unless consolidated.

The average daily attendance of children at the school in district No. 1 for the school year ending July 31, 1916, was fifteen; that of district No. 2 was four; and that of district No. 9 was fifteen. The assessed valuation of the taxable property in district No. 1 for such year was \$41,437; that of district No. 2 was \$30,421; and that of district No. 9 was \$16,470. The assessed valuation of union free school district No. 6 was \$110,119. The total assessed valuation of the consolidated district will be \$198,447. It appears that for said school year two teachers were employed at the school in union free school district No. 6, and there was an average daily attendance of thirty-eight. The probable total number of children in attendance at the school in the consolidated district will therefore be not more than one hundred and ten. There are at present employed in the schools of the dissolved district five teachers, and it is stated by the respondent that four teachers will be sufficient to give suitable instruction to the children of the consolidated district in the central school, including instruction in two or more years of high school work.

Union free school district No. 6 comprises the unincorporated village of Williamstown, which is the natural commercial social and religious center of the community. The school-house in that district is a substantial building and may be repaired or altered without difficulty, so as to give suitable facilities to all the children of the consolidated district. The school already maintained in that district is graded and if the children of the dissolved districts are in attendance it will necessitate a more complete organization, with facilities for giving instruction in advance of that now given.

The papers on appeal show that all but four of the families in dissolved districts Nos. 1, 2 and 9 live less than two miles from the school-house in the village of Williamstown. Some of the children in district No. 9 will be required to travel two miles or more to reach the school-house at Williamstown. The school-house

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in district No. 1 is less than a mile, and the school-houses in districts Nos. 2 and 9 are about a mile and a quarter from the school-house in union free school district No. 6. It would appear, therefore, that the increased distances required to be traveled by the children in the dissolved districts are not prohibitive and will not seriously interfere with school attendance. The school authorities of the consolidated district may, in case the distances are so great as to prevent school attendance, provide means of transportation. They will be better enabled to do this because of the provision made for the apportionment of the district quotas of the dissolved districts to the consolidated district.

The consolidation will permit of the elimination of three small ungraded elementary schools, one of most meager attendance, of low educational standards and unsatisfactory equipment, and the substitution therefor of a graded department school, with either a partial or a full high school course, taught by experienced teachers. The central school maintained in the building now provided for it, equipped with modern appliances and apparatus, will be able to provide much more effective instruction for the children of the community than they now receive. The establishment and maintenance of a high school course would give to the children of this community advantages which they can only now obtain after considerable hardship, inconvenience and expense. The resources of the consolidated district are sufficient to justify the proposed improved educational conditions. There can be no advancement or improvement without consolidation as affected by the respondent's order.

The facts presented upon the appeal and information obtained through officers of this Department who have reported as to the educational conditions in this community indicate convincingly that the proposed centralization of school facilities in the manner contemplated by the respondent will benefit ultimately the children of the entire community. The tax burden imposed by the maintenance of such a school, taking into consideration the district quotas to be apportioned to the consolidated district and the additional teachers' quotas because of the employment of the additional teachers, will not be far in excess of that required for the main-

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tenance of the inadequate and unsatisfactory ungraded schools in the dissolved districts. It is my belief that the order of consolidation will be, as stated by the respondent, to the educational advantage of the dissolved districts. It is therefore my duty to sustain the respondent's order. In view of the fact, however, that such order of consolidation was stayed pending the determination of the appeals herein and that schools are being maintained in the dissolved districts at the present time, and that trustees are in office in such districts and have levied taxes which are being collected for the support of such schools, it is advisable to postpone the taking effect of the order until such schools are closed. The respondent district superintendent is therefore directed to modify his order of dissolution and consolidation so that it shall take effect not earlier than June 1, 1917.

The appeals are dismissed.

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In the Matter of the Appeal from an Order Dividing UNION FREE SCHOOL DISTRICT No. 1, Town of Pelham, and Forming a New District out of a Part of the Territory Thereof

Case No. 345

(Decided December 5, 1916)

The interests of the children of the entire district are the State's first concern and on this basis under the facts here shown the appeal herein is sustained.

Union free school district No. 1, town of Pelham, Westchester county, as now constituted, included that town and includes the villages of North Pelham, Pelham and Pelham Manor. Samuel J. Preston, the district superintendent of schools of the first supervisory district of Westchester county, made an order to take effect April 5, 1916, dividing the district so as to leave the village of North Pelham a district by itself. Appellants are residents and tax payers of union free school district No. 1, town of Pelham, and appeal upon the ground that the order is against the educational interests of the old district. There is no proof or suggestion of proof that the children of Pelham and Pelham Manor will receive additional opportunities by the creation of the new district. The change also creates other disadvantages. Appeal sustained.

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Harry A. Anderson, attorney for appellants.

Albert R. Palmer, attorney for respondent.

FINLEY, Commissioner.— Union free school district No. 1, town of Pelham, Westchester county, comprises all of such town, and embraces within its limits the incorporated villages of North Pelham, Pelham and Pelham Manor. Samuel J. Preston, district superintendent of schools of the first supervisory district of Westchester county, executed an order, dated March 8, 1916, to take effect April 5, 1916, dividing such union free school district and forming out of a portion of the territory thereof a new district to be known as school district No. 2, town of Pelham. Such new district, as so established, was to include substantially all of the territory within the villages of Pelham and Pelham Manor, leaving the village of North Pelham as a district by itself. The order directed that the bonded indebtedness of the district and the value of the school property be apportioned equitably between the two districts.

The appellants are residents and taxpayers of union free school district No. 1, town of Pelham, four of them residing in the village of North Pelham, two in the village of Pelham and one in the village of Pelham Manor. Their appeal is based upon the grounds, among others, that the order is opposed to the educational interests of the district as constituted before such order was executed and that it discriminates against and is unjust to the taxpayers and residents of the village of North Pelham. Many of the residents of the villages of Pelham and Pelham Manor are against the attempted division of the district, it being insisted forcibly upon the argument that if a vote of all the qualified electors of such villages were taken upon the question it would appear that a majority were in favor of retaining the existing district. But notwithstanding the apparent diversity of opinion among the residents of such villages as to the advisability of a division of the district, it is obvious that the real controversy is between the residents of such villages who favor the establishment

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of a new district and the residents of North Pelham who oppose the change.

A determination of the issues raised on the appeal necessitates a consideration of the local situation. As has already been noted, union free school district No. 1 comprises all the town of Pelham, so that for tax and other purposes the town is the school unit. The district lies between the cities of Mount Vernon and New Rochelle, and borders upon the city of New York. It is almost entirely a residential community, the greater portion of the inhabitants having business in the city of New York. The population of the district according to the last State census is 4,470, of which North Pelham has 1,900, Pelham 1,090 and Pelham Manor 1,480. There are two grammar or elementary schools and a high school maintained in the district, viz., the Hutchinson school at North Pelham, and the Siwanoy and high school at Pelham Manor. There were 621 pupils registered in attendance at such schools during the school year ending in June, 1915, of which 311 attended the Hutchinson school, 224 the Siwanoy school and 86 the high school. More than one-half of the pupils in the high school reside in the village of North Pelham, and of the graduates from such school during the past three years a majority were from North Pelham. The assessed valuation of the taxable property in North Pelham is \$1,621,423, of that in Pelham, \$1,819,180, and of that in Pelham Manor, \$3,371,754. By dividing the district as proposed in the order, the North Pelham district would have a valuation of \$1,621,423, while that of the new district would be \$5,190,934.

Ordinarily the presumption would be in favor of the reasonableness and educational propriety of an order of a district superintendent dividing a district and establishing a new district out of the territory thereof. The order appealed from contravenes the established policy of the Department, which has the general support of authorities in school administration and has been sustained by legislative enactment, in respect to the elimination of duplication of school control when feasible, and the concentration of the teaching and supervision forces so that school facilities may be organized more economically and advantageously for the benefit of as many pupils as may avail themselves conveniently of such

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facilities. In view of this circumstance it must appear that the conditions under which the order was executed are such as to render it impossible to maintain the schools of the district under one management without affecting injuriously the educational welfare and interests of the children of the district.

There is no proof, or suggestion of proof, adduced by those favoring the division that the children of the villages of Pelham and Pelham Manor will receive additional or improved educational opportunities or advantages by the establishment of a new district, or that they will be able to attend school with less difficulty or inconvenience if the change is made. The Siwanoy school and the high school are in the village of Pelham Manor, conveniently accessible to the children in the new district, and the division is not contemplated with a view of changing the location or increasing the facilities of such schools. The only obvious effect of the division will be to deprive the pupils in North Pelham of the privilege of attending the high school in Pelham Manor, which has been erected and maintained by the aid of the taxpayers of North Pelham so that their children may have the advantage of secondary instruction within their own district. The loss thus occasioned may be supplied only by the establishment and maintenance of a high school in connection with the elementary school now maintained in that village. The effect would be to have two small high schools, each with forty or less pupils, in place of the present comparatively strong high school. Such a change would result in a substantial weakening of the local school organization and materially lessen the school advantages of more than a majority of the children of the community. The proposed division of the district will not improve school conditions. The interests of the children of the entire district are the State's first concern, and in this view of the situation it seems clear that the "educational interests of the community" described in the respondent's order do not require the organization of a new district out of the territory of the present district.

It may not be doubted that the district superintendent acted in good faith and for what seemed to him to be for the benefit of all concerned, in ordering the organization of a new district.

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There was evident lack of harmony between the patrons of the school residing at Pelham Manor and those at North Pelham. The respondent states in part explanation of his position. "Sectionalism does exist. It is not a theory, but a condition. It may be regretted, but the fact remains. Independent investigation has established this fact to my entire satisfaction, etc."

The proof adduced, the arguments and assertions of interested parties, the briefs of attorneys, and communications on file in this Department disclose forcefully enough that there was conflict between the two sections of the district, based presumably on differences of social conditions and environment. It is unnecessary to comment upon this aspect of the case other than to note its influence upon the district superintendent. He conceived it of sufficient importance to justify the summary separation of the contending localities, and his views of the situation are entitled to respectful consideration. I am unable, however, after careful and thoughtful consideration, to come to his conclusion.

Half the children and one-quarter of the taxable property are left by the order in the North Pelham district, while three-quarters of the wealth of the district is chargeable with the education of the remainder of the children of the district. This adjustment imposes an inequitable financial burden upon the portion of the district having smaller resources and greater obligations. The individual wealth of the residents of Pelham and Pelham Manor is far greater than that of the residents of North Pelham. None of the former have been heard to say that they are not willing that the children of their North Pelham neighbors should share equally with their own in the superior school facilities and advantages which their greater wealth will enable them to provide. They could not expect the district superintendent or the Commissioner of Education to sustain a contention that the district should be divided for the reason that they desired to afford their children certain educational advantages or opportunities which were not suitable for other children in the district. Such a contention strikes at the basis of our public school system, which demands that our schools be free, with equal privileges, to all.

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The district as it now exists has sufficient financial resources to furnish exceptional school facilities and appropriate instruction, whether vocational or otherwise, to all children in the district, regardless of their environment or their social status. If conflicting notions as to the needs of the children of the district result in sectionalism and dissension, retarding school development and seriously injuring the educational interests of the children of the district, the Department, in the exercise of its supervisory control of the schools of the district, will endeavor by appropriate action to bring about a settlement of the controversies. But lack of harmony or incompatibility between sections of a district ought not to be regarded as a justification for a separation of the contending portions, especially if it appears, as in this case, that a majority of the children of the district may be deprived by the division of substantial educational privileges.

The appeal is sustained.

It is hereby ordered that the order executed on March 8, 1916, by Samuel J. Preston, district superintendent of schools of the first supervisory district of Westchester county, organizing a new school district to be known as school district No. 2, town of Pelham in such county, out of a portion of the territory of union free school district No. 1 of such town, be and the same hereby is set aside and declared of no effect.



# COURT OF CLAIMS

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## RULES<sup>1</sup> OF THE COURT OF CLAIMS

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(ADOPTED NOVEMBER 8, 1916)  
(IN EFFECT JANUARY 1, 1917)

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### AMENDMENTS.

**RULE 1.**— Claims, counterclaims and replies may be amended upon order of the court or a judge thereof.

The order granting the amendment must set forth verbatim the amended part or parts of the pleading and by the necessary references to the original pleading must indicate where the changes in the original pleading are made.

The amended pleading must recite on its face the date when the order permitting the amendment was granted.

Except when the order permitting the amendment is made during the course of the trial of a claim or counterclaim, or unless the order permitting the amendment otherwise directs, the party securing the order must file in the clerk's office at Albany within ten days after the order permitting the amendment is granted an original and twelve copies of the entire pleading as amended, and he must within the same time serve upon the adverse party a duplicate original thereof.

### ANSWERS.

**RULE 2.**— The state is not required to answer a claim and all allegations in the claim are treated as denied.

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<sup>1</sup> Sec. 265 of the code of civil procedure provides as follows: "The court may establish rules for its government, and the regulation of practice therein; prescribe the forms and methods of procedure before it, vacate or modify judgments, and grant new trials, and except as otherwise provided in said rules and regulations, or the code of civil procedure, the practice shall be the same as in the supreme court. Rules of the board of claims or former court of claims, now in force, shall continue to be the rules of the court of claims until changed by such court."

Court of Claims

**APPEAL.<sup>2</sup>**

**RULE 3.**— Except as otherwise directed by these rules, the practice on appeal shall be the same as that in the supreme court and court of appeals.

**RULE 4.**— The successful party on appeal must file in the clerk's office of the court of claims at Albany the original printed case on appeal together with a certified copy of the order of the appellate court remitting the proceedings to the court of claims within ten days after said order is filed in the clerk's office of said appellate court, together with (1) an original and two copies of his proposed order making the order or judgment of the appellate court the order or judgment of the court of claims, and (2) an original and two copies of his proposed judgment of the court of claims based on said order. If the successful party on appeal fails to comply with this rule, the adverse party may make application to the court of claims for the entry of the appropriate orders and judgments.

**RULE 5.**— When costs on appeal are allowed by the appellate court, the successful party on appeal must within the time stated in Rule 4 file in the clerk's office of the court of claims at Albany his proposed bill of costs, and at the same time serve upon the adverse party a copy thereof, together with notice of taxation of costs, which shall be not less than five nor more than ten days thereafter.

When costs on appeal are allowed by the appellate court, the same may be stipulated by the parties, and if not so stipulated shall be taxed by the clerk of the court of claims in like manner as costs are taxed in the supreme court.

**ATTORNEY, WHEN PARTY REPRESENTED BY.**

**RULE 6.**— Whenever under these rules a party to a claim is directed to do an act, or service of any paper or notice is directed to be made upon any party to a claim, if said party is represented by an attorney said act must be done by said attorney and said service must be made upon said attorney.

**BRIEFS.**

**RULE 7.**— Whenever either party desires to submit a brief or the court directs the submission thereof, the party submitting

<sup>2</sup> See sections 275 to 278, inclusive, of the code of civil procedure relative to appeals from orders and judgments of the court of claims.

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 Court of Claims
 

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the same must serve a copy upon the adverse party within the time prescribed by the court for that purpose, or if the time is not so prescribed, within twenty days after the completion of the trial or the hearing of the application, in connection with which the brief is submitted. If either party desires to submit a reply brief, the party submitting the same must serve upon the adverse party a copy of said reply brief within ten days after the service upon him of the brief to which his brief is a reply.

Whenever either party to a claim serves upon the adverse party, pursuant to this rule, any brief, he must at the same time send to the clerk's office at Albany four copies thereof. The clerk shall upon the receipt thereof send one copy to each of the judges hearing the claim and shall file the remaining copy or copies in his office.

All briefs must recite on their face when and where the claim was tried, or the application made, and before which judge or judges.

### CALENDAR OF CLAIMS.\*

**RULE 8.**—The district calendar shall be made up for each of the districts mentioned below of the claims arising within the counties named :

#### ALBANY DISTRICT

Albany	Franklin	Orange	Schoharie
Bronx	Fulton	Putnam	Suffolk
Broome	Greene	Queens	Sullivan
Clinton	Hamilton	Rensselaer	Tioga
Columbia	Kings	Richmond	Ulster
Delaware	Montgomery	Rockland	Warren
Dutchess	Nassau	Saratoga	Washington
Essex	New York	Schenectady	Westchester

#### UTICA DISTRICT

Chenango	Lewis	Otsego	St. Lawrence
Herkimer	Oneida		

#### SYRACUSE DISTRICT

Cayuga	Jefferson	Onondaga	Seneca
Cortland	Madison	Oswego	Tompkins

#### ROCHESTER DISTRICT

Chemung	Ontario	Schuyler	Wayne
Livingston	Orleans	Steuben	Yates
Monroe			

#### BUFFALO DISTRICT

Allegany	Chautauqua	Genesee	Wyoming
Cattaraugus	Erie	Niagara	

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\* See section 284 of the code of civil procedure, added by Laws 1916, chap. 393.

Court of Claims

**RULE 9.**—The clerk shall prepare a calendar for each regular term of the court as directed by section 284 of the code of civil procedure of all claims which are filed in his office at Albany at least thirty days before the commencement of the term for which the calendar is made up; and he shall prepare a calendar of claims for each special term of the court as directed in writing by the presiding judge.

No claim shall be added to the calendar except by written order of the court (1) upon the written consent of both parties, or (2) upon written notice, stating the reasons for the application, served upon the adverse party at least eight days before the opening of the term of court for which the calendar is made up. Copies of the application papers must be sent to the clerk's office at Albany at the same time that they are served upon the adverse party.

Whenever any claim is added to the calendar for a district other than the one in which said claim arose, such addition shall be in force only during the term at which the claim is added to the calendar, and at the end of said term, if said claim has not been disposed of, it shall resume its regular place on the calendar for the district in which it arose.

**RULE 10.**—Unless the court otherwise directs, the first day calendar shall consist of such claims as shall be announced as ready for trial by either party upon the formal call of the calendar on the opening day of the term. From time to time during the continuance of said term, the court may in its discretion add to such original day calendar other claims upon the general calendar. The representative of the attorney-general's office in charge at said term of court shall immediately notify the attorneys for the respective claimants of such addition of claims to the day calendar.

**CLAIM.\***

**RULE 11.**—The claim must state concisely the facts constituting the same, the nature and extent of the interest, and the post-office address, of each claimant therein.

It must state whether or not the claim, or any part thereof, has been assigned, and if assigned the name and post-office address of each person interested in the claim, and the nature and extent of such interest.

\* For suggested forms for claims, see the appendix to these rules.

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Court of Claims

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It must state whether or not it has been submitted to any other tribunal or officer for audit or determination, and if so to what tribunal or officer, and the determination of such tribunal or officer therein.

In all cases where a notice of intention to file a claim is required by law, the claimant, before filing said claim in the clerk's office at Albany, must attach to the original and to the twelve copies thereof a copy of said notice of intention, and the claim must state the date of filing of such notice both in the office of the clerk of the court of claims and in the office of the attorney-general.<sup>5</sup>

Where the claim is for the temporary or permanent appropriation of property, it must contain a specific description of the property, giving its location and quantity.

There must be included in each claim, or attached thereto as a part thereof, a schedule showing in detail each item claimed, and the amount of such item.

If the claim is filed under a special statute, such statute must be set out in full in the claim.

The claim must be signed at the end thereof by the claimant's attorney, giving the attorney's post-office address.

It must be verified in the same manner as pleadings in the supreme court.

The original may be either typewritten or printed, but where the amount claimed exceeds \$500 the copies must be printed.

**RULE 12.**— A claim shall be filed by delivering it at the clerk's office in Albany to the clerk or in his absence to some person in charge of the office, or upon the receipt thereof at the clerk's office in Albany by mail or by express.<sup>6</sup> At the time of filing the original claim or within ten days thereafter the claimant must file in the clerk's office at Albany twelve copies thereof.

### CLERK.

**RULE 13.**— The duties of the clerk, unless otherwise ordered in writing by the court, shall be as follows: 1. He shall receive and file all papers in a claim which comply with the statutes and rules relating thereto. 2. He shall number each claim in the

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<sup>5</sup> Section 270 of the code of civil procedure provides in part as follows: "In all cases of canal claims a copy of each such claim and of notice of claim which is or may hereafter be required to be filed with the court of claims shall be filed with the superintendent of public works \* \* \*."

<sup>6</sup> See footnote 5.

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order of its filing, and give each amended or supplemental claim and other papers in the claim the same number as the original claim. 3. He shall deliver three copies of each claim to the attorney-general and four to the superintendent of public works, and shall retain the remaining copies for the use of the court. 4. He shall notify the claimant or his attorney of the date of filing a claim and of its number. 5. He shall mail a copy of the calendar at least five days before the beginning of the term to each claimant whose claim appears thereon, or to his attorney. 6. He shall cause to be entered in appropriate books all papers which are required to be recorded and shall have the care and custody of such books and of all papers filed in his office. 7. He shall perform such other duties as may be prescribed by the court or not inconsistent therewith by any judge of the court.

**COUNTERCLAIM.**

**RULE 14.**— Where a counterclaim is necessary the attorney-general must plead the counterclaim in conformity with the provisions relating to claims so far as applicable. A counterclaim must be verified by the attorney-general or by one of his deputies.

Unless otherwise permitted by the written order of the court or a judge thereof, the attorney-general must, at least ten days before the beginning of the term at which the claim is to be tried, file in the clerk's office at Albany an original and five copies of the counterclaim and must at the same time that he files said counterclaim serve a duplicate original thereof upon the claimant.

**DATE OF ISSUE.**

**RULE 15.**— The date of issue is the date of filing the claim in the clerk's office at Albany.

**DISBURSEMENTS FOR APPROPRIATION MAPS.**

**RULE 16.**— An allowance will be made in the judgment in appropriation claims for the actual expense incurred by the claimant in securing copies of the official appropriation maps required to be attached to appropriation claims under the rules only when such expense is proven or stipulated in open court and included in the award.

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**DISCONTINUANCE.**

**RULE 17.**— Where a counterclaim is pleaded the claimant cannot discontinue except as permitted by the written order of the court or a judge thereof.

**DISMISSAL OF CLAIM OR COUNTERCLAIM.**

**RULE 18.**— An application may be made to the court to dismiss a claim or a counterclaim in whole or in part on the ground (1) that said claim or counterclaim, or a part thereof, does not state facts sufficient to constitute a cause of action, or (2) that the court does not have jurisdiction of said claim or counterclaim, or a part thereof, either with respect to one or more of the parties thereto or with respect to the subject matter thereof. Unless said application is made during the trial of said claim or counterclaim, it will not be entertained by the court except on eight days written notice to the adverse party stating the grounds therefor, unless the adverse party waives or modifies this requirement.

**EXHIBITS.**

**RULE 19.**— Each party must, before submitting to the court an exhibit, mark conspicuously on said exhibit the number of the claim and claimant's name.

In all litigated claims each party must within five days after the claim is finally submitted, file in the clerk's office at Albany five copies of a list of all exhibits submitted by him to the court. Such list must sufficiently describe said exhibits so as to permit the identification thereof and must give the official number or symbol attached to each exhibit by the court stenographer; it must recite on its face when and where the claim was tried and before which judge or judges, and shall be signed at the end thereof by the attorney for the party submitting the same. The clerk shall send one copy of said list to each of the judges hearing the claim and shall file the remaining copies in his office.

Each party shall retain and be responsible for his own exhibits, but the clerk of the court may at any time require the exhibits, or any of them, to be filed in the clerk's office at Albany for the use of the court or of either party to the claim. Upon the issuing of a certificate of no appeal by the attorney-general in any claim, or after the expiration of the time for taking an appeal therein, the clerk may return to the party the exhibits sent by said party to the clerk's office.

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**GUARDIAN AD LITEM.**

**RULE 20.**—A guardian ad litem may be appointed by the court, or one of the judges thereof, as provided by the rules of practice of the supreme court.

**JUDGMENTS.\***

**RULE 21.**—The successful party must within five days after receipt from the clerk of a notification of the award of the court submit to the clerk an original and two copies of his proposed judgment. If said party fails to do so, the adverse party may submit such proposed judgment.

Unless otherwise ordered by the court or a judge thereof, the judgment in appropriation claims shall not be entered until the attorney-general files in the clerk's office at Albany his written approval of title to the property appropriated by the state, including his direction as to the claimant or claimants in whose name judgment should be entered. In all other cases judgment shall be entered by the clerk as soon as the proposed judgment is submitted to him pursuant to this rule, or in default thereof as soon as practicable thereafter.

**MAPS.**

**RULE 22.**—In appropriation claims, the claimant, before filing the claim in the clerk's office at Albany, must attach to the original and to the twelve copies thereof a duplicate of the official appropriation map or maps filed in the office of the state engineer and covering the property for which the claim is filed.

In other claims affecting real property, and in negligence claims, a rough sketch or drawing showing the location of the premises affected, or the place where the claimant alleges that the accident occurred, must be so attached.

**NOTICE OF INTENTION TO FILE A CLAIM.**

**RULE 23.**—In addition to the requirements prescribed by section 264 of the code of civil procedure for a notice of intention to file a claim, every notice of intention must state on its face the post office address of each claimant therein and the post office address of the attorney for each claimant.

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\* For suggested forms for judgments and for the procedure necessary to secure payment of judgments, see the appendix to these rules.



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**NUMBER OF CLAIM.**

**RULE 24.**—The number given to the claim by the clerk when the same is filed in his office must be indicated on the face of all subsequent papers in the same proceedings filed in the clerk's office or submitted to the court by the party filing or submitting the same.

**ORDERS.**

**RULE 25.**—Whenever either of the parties to a claim shall apply to the court or a judge thereof for an order, it shall be the duty of the party making the application (1) to present to the judge or judges to whom the application is made his proposed order in writing and (2) to send to the clerk's office at Albany three copies of said proposed order. When said order, signed by the judge or judges to whom it is presented, is filed in the clerk's office, the clerk shall send to the respective parties certified copies thereof.

Except when an order is applied for during the trial of a claim, no application shall be made to the court or a judge thereof for any order except on eight days written notice to the adverse party, stating the grounds therefor, unless the adverse party waives or modifies this requirement.

**REPLY.**

**RULE 26.**—A counterclaim is admitted unless a reply is filed and served as prescribed by these rules. A reply must be verified in the same manner as pleadings in the supreme court.

Unless otherwise permitted by the written order of the court or a judge thereof, the claimant must, within twenty days after the service upon him by the attorney-general of a counterclaim, file in the clerk's office at Albany an original and twelve copies of his reply and must at the same time that he files said reply serve a duplicate original thereof upon the attorney-general.

**SIZE OF PAPERS.**

**RULE 27.**—Where a claim or other paper in a case is type-written the size of the paper used shall be substantially eight inches by thirteen inches and when printed substantially eight inches by ten and one-half inches.

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**SUBMISSION OF CLAIM ON AGREED STATEMENT OF  
FACTS.**

**RULE 28.**— Whenever a claim is submitted to the court on an agreed statement of facts, the claimant must within five days thereafter file in the clerk's office at Albany a copy of said statement which must be signed at the end thereof by both parties, together with a memorandum stating when and where the claim was submitted and to which judge or judges. Each party must within the same time file in the clerk's office at Albany a list of all papers submitted by said party to the court, which list must sufficiently describe said papers so as to permit the identification thereof.

## Court of Claims

## APPENDIX TO RULES

I. The following forms are suggested as aids to claimants.<sup>3</sup>

## FORM A.

## Notice of Intention to File Claim.

## STATE OF NEW YORK — COURT OF CLAIMS.

JOHN DOE <i>against</i> THE STATE OF NEW YORK.	} Notice of intention to file claim
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To the Clerk of the Court of Claims:

To the Attorney-General of the State of New York:<sup>6</sup>

Please take notice that the undersigned, John Doe, intends to file a claim against the State of New York, pursuant to section 264 of the Code of Civil Procedure.

The post-office address of the claimant herein is .....

The attorney for the claimant herein is Richard Roe, Esq., and his post-office address is .....

The time when and the place where such claim arose and the nature of the same are as follows:

.....  
 .....  
 .....  
 .....

JOHN DOE,  
*Claimant.*

RICHARD ROE,  
*Attorney for claimant.*

<sup>3</sup> This appendix is not a part of the rules and has not been adopted by the court. The forms are not official forms and their use is not mandatory except to the extent that they incorporate provisions required by the rules. (See Rule 1, paragraph 3, and Rule 11.) They are obviously intended to cover only the ordinary situations, and claimants must modify them if necessary to meet the actual facts involved in their particular claims.

No attempt has been made to suggest a form for claims arising on or out of contracts because the facts in such claims vary to such an extent that no general form could be suggested which would be of much assistance. A claim on contract which meets the requirements of a complaint in the supreme court is sufficient provided, of course, it incorporates the special provisions required by Rule 11.

<sup>6</sup> See footnote 5 on page 626 giving the provision in section 270 of the code of civil procedure relative to the filing of canal claims and notices of such claims with the superintendent of public works.

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STATE OF NEW YORK,  
County of ..... } ss.:  
City of .....

John Doe, being duly sworn, says: I am the claimant above named; I have read the foregoing notice of intention to file a claim against the State of New York and know its contents; the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

JOHN DOE.

Sworn to before me the .....  
day of ....., 191..

JOHN SMITH,

Notary Public (or other officer authorized to take affidavits).

FORM B,

Claim for Permanent Appropriation.

STATE OF NEW YORK — COURT OF CLAIMS.

JOHN DOE  
against  
THE STATE OF NEW YORK. } Claim No. ....

1. The post-office address of the claimant herein is .....
2. This claim is for the permanent appropriation of land by the State for the Barge canal pursuant to Laws of 1903, chapter 147, as amended, and the notice of such appropriation was served upon the claimant on the ..... day of ....., 191..<sup>10</sup>
3. The claimant was at the time of the appropriation the sole owner in fee of the premises appropriated.
4. The premises appropriated are described as follows: (Insert description in detail as given on the official appropriation map including the contract number and the parcel number indicated on said map.)
5. Attached hereto as a part of the claim is a duplicate of the official appropriation map served upon the claimant.
6. This claim has not been assigned and has not been submitted to any other tribunal or officer for audit or determination.
7. This claim is filed within two years after the claim accrued, as required by law.<sup>11</sup>

<sup>10</sup> See note on page 639 indicating how this paragraph must be changed if the land was appropriated under other statutes or for other than barge canal purposes.

<sup>11</sup> If the claim is not filed within two years after it originally accrued, but is filed pursuant to any statute (such, for instance, as Laws 1916, ch. 420) which permits the claim to be filed after the expiration of the two years, this paragraph should be modified so as to state the exact facts and a specific reference to the statute permitting the filing of the claim should be made. If this statute is a special statute (as distinguished from a general statute) it must be set out in full in the claim. See Rule 11, paragraph 7.

## Court of Claims

8. The particulars of claimant's damages are as follows:

3 acres of land appropriated.....	\$450
15 acres of remaining land damaged.....	300
Total . . . . .	<u>\$750</u>

RICHARD ROE,  
*Attorney for Claimant.*

Office and post-office address,  
.....

STATE OF NEW YORK,  
County of ..... } ss.:  
City of ..... }

John Doe, being duly sworn, says: I am the claimant above named; I have read the foregoing claim and know its contents; the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

JOHN DOE.

Sworn to before me the .....  
day of ....., 191..

JOHN SMITH,  
*Notary Public* (or other officer authorized to take affidavits).

## FORM C.

## Claim for Damages for Negligence.

STATE OF NEW YORK — COURT OF CLAIMS.

JOHN DOE  
against  
THE STATE OF NEW YORK. } Claim No. ....

1. The post-office address of the claimant herein is .....
2. This claim is for negligence of the State in constructing and maintaining a bridge, known as the ..... bridge, over the Erie canal in the city of ....., N. Y., and particularly in failing to provide said bridge with suitable railings and to light the same.
3. On the ..... day of ....., 191..., without any negligence on his part, claimant fell off the west side of said bridge about the middle thereof and received the following injuries: (State in detail injuries received.)
4. This claim has not been assigned and has not been submitted to any other tribunal or officer for audit or determination.
5. Attached hereto is a copy of the notice of intention to file this claim, which notice was filed in the office of the clerk of the Court of Claims on the ..... day of ....., 191..., and in the office of the Attorney-General on the ..... day of ....., 191....<sup>12</sup>

<sup>12</sup> See footnote 5 on page 626 giving the provision in section 270 of the code of civil procedure relative to the filing of canal claims and notices of such claims with the superintendent of public works.

Court of Claims

6. This claim is filed within two years after the claim accrued, as required by law. (But see footnote 11 on page 633.)

7. Attached hereto as a part of the claim is a sketch of the place of the accident.

8. The particulars of claimant's damages are as follows:

Dr. Bell's bill for services.....	\$50
Mary Smith's bill for nursing.....	40
St. Mary's Hospital expenses.....	50
Medicines . . . . .	25
Personal suffering, etc.....	2,000
<b>Total . . . . .</b>	<b>\$2,165</b>

RICHARD ROE,  
*Attorney for Claimant.*

Office and post-office address,

.....

(For verification, see Form B.)

FORM D.

Claim for Damages for Leakage.

STATE OF NEW YORK — COURT OF CLAIMS.

JOHN DOE <i>against</i> THE STATE OF NEW YORK.	}	Claim No. ....
--	---	----------------

1. The post-office address of the claimant herein is .....

2. This claim is for the destruction of crops and damage to meadow land, owned by the claimant, due to leakage from the Barge canal from the ..... day of ....., 191..., to the ..... day of ....., 191..., by reason of the negligent construction and maintenance of the banks thereof by the State of New York.

3. The premises owned by claimant are situated in the town of ....., county of ....., New York, and consist of fifty acres, and the portion affected by the negligence of the State is about thirty-five acres lying adjacent to the canal.

4. This claim has not been assigned and has not been submitted to any other tribunal or officer for audit or determination.

5. Attached hereto is a copy of the notice of intention to file this claim, which notice was filed in the office of the clerk of the Court of Claims on the ..... day of ....., 191..., and in the office of the Attorney-General on the ..... day of ....., 191...<sup>13</sup>

6. This claim is filed within two years after the claim accrued, as required by law. (But see footnote 11 on page 20.)

<sup>13</sup> See footnote 5 on page 626 giving the provision in section 270 of the code of civil procedure relative to the filing of canal claims and notices of such claims with the superintendent of public works.

## Court of Claims

7. Attached hereto as a part of the claim is a sketch of the entire premises owned by the claimant which also shows the portion affected by the negligence of the State.

8. The particulars of claimant's damages are as follows:

20 acres of corn totally destroyed, at \$30 an acre..	\$600
10 acres of potatoes partially destroyed, at \$30 an acre .....	600
5 acres of meadow land damaged, at \$10 an acre..	50
Total .....	<u>\$1,250</u>

RICHARD ROE,

*Attorney for Claimant.*

Office and post-office address,

.....

(For verification, see Form B.)

## FORM E.

## Judgment in Appropriation Claims.

## STATE OF NEW YORK—COURT OF CLAIMS.

JOHN DOE  
against  
THE STATE OF NEW YORK.

Claim No. ....

....., attorney for claimant.

....., Deputy Attorney-General, for the State of New York.

This claim for the sum of ..... (\$.....) for damages resulting from the permanent appropriation on the ..... day of ....., 191... (see note 1<sup>st</sup>), of the premises described below, situated in the ....., for the Barge canal, pursuant to chapter 147 of the Laws of 1903, as amended (see note 2<sup>nd</sup>), filed the ..... day of ....., 191..., and numbered ....., came on to be heard before this court at a session thereof held in the city of ..... on the ..... day of ....., 191...

The court having heard the proofs and allegations of the parties and having duly made and filed its findings of fact and conclusions of law, it is (see note 3<sup>rd</sup>)

*Ordered and adjudged*, That ....., the above named claimant, recover herein against the State of New York the sum of ..... (\$.....), with interest thereon from the ..... day of ....., 191..., the date of said appropriation, to the ..... day of ....., 191... (see note 4<sup>th</sup>) the date of entry of this judgment, to wit: (see note 4<sup>th</sup>) ..... (\$.....), together with the sum of \$....., the cost of procuring maps, amounting in all to the sum of (see note 4<sup>th</sup>) ..... (\$.....) for the

<sup>14</sup> See the notes on the drafting of judgments in appropriation claims which follow this form.

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permanent appropriation of the following described premises and in full settlement of said claim:

Contract No. . . . ., Parcel No. . . . .

(Insert here the exact description of the premises appropriated as given in the official appropriation map served on the claimant) . . . . .

. . . . .  
. . . . .  
. . . . .  
. . . . .

*Clerk of the Court of Claims.*

**Notes on the Drafting of Judgments in Appropriation Claims.**

**NOTE 1.** Insert here the date when the notice of appropriation was served upon claimant.

**NOTE 2.** If the land was appropriated for the Cayuga and Seneca canal, the statutory reference should be to Laws 1909, ch. 391, as amended; and if for barge canal terminals, to Laws 1911, ch. 746, as amended.

If the land was appropriated for other than barge canal purposes, this part of the judgment should of course be changed to conform to the facts. For instance, provision is made for the appropriation of land for the state reservation at Saratoga Springs by Laws 1916, ch. 295, §§ 600-604 (see Laws 1909, ch. 569; Laws 1911, ch. 394; Laws 1914, ch. 252), and for the appropriation of land within the Adirondack or Catskill parks or adjacent thereto by Laws 1916, ch. 451 (see Laws 1909, ch. 24, §§ 46-49; Laws 1912, ch. 444).

**NOTE 3.** Where no proof is offered by the state in opposition to the claim, this paragraph of the judgment should read as follows:

The court having heard the proofs and allegations of the claimant and having determined the legal liability of the state, and the claimant having offered to accept the sum of . . . . . (\$ . . . . .) with interest thereon from the . . . . . day of . . . . ., 191 . . . , together with the sum of \$ . . . . ., the cost of procuring maps, in full settlement of said claim, and no proof having been offered by the state in opposition thereto, it is

**NOTE 4.** In submitting judgments to the clerk's office pursuant to Rule 21, this space should be left blank. The clerk, "unless otherwise ordered by the court or a judge thereof," is not authorized to enter judgment in permanent appropriation claims until the attorney-general has filed in the clerk's office his written approval of title, etc., to the land appropriated. (See Rule 21.) The clerk's office will fill in the date of the entry of the judgment, will compute the interest down to the date of the entry of the judgment, or as otherwise directed by the court, and will insert in the judgment the amount of interest and the total amount of the judgment. See section 269 of the code of civil procedure relative to the allowance by the state comptroller of interest on judgments.



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**GENERAL NOTE.** The suggested form of judgment is obviously intended to cover only the ordinary situation. When any orders have been granted after the filing of the claim (particularly any orders granted at the trial itself) which have any relation to the award or to the judgment, the party obtaining these orders must not only see that they are entered in the clerk's office at Albany (see Rule 25) but he must also insert descriptive recitals of these orders in the proposed judgment which he is required to submit to the clerk pursuant to Rule 21. The most frequent orders of this character are those amending the claim or award (either as to parties or subject matter) or consolidating claims for the purposes of the trial.

Parties are requested to submit their proposed judgments to the clerk's office *without backers* and they are also requested not to fasten the sheets together with any permanent fasteners.

**FORM F.****Judgment in Claims other than Appropriation Claims.**

## STATE OF NEW YORK — COURT OF CLAIMS.

JOHN DOE  
against  
THE STATE OF NEW YORK.

} Claim No. ....

....., attorney for claimant.

....., Deputy Attorney-General, for the State of New York.

This claim for the sum of ..... (\$.....) for the (see note 1<sup>st</sup>) ..... filed on the ..... day of ..... 191..., and numbered ..... came on to be heard before this court at a session thereof held in the city of ..... on the ..... day of ..... 191....

The court having heard the proofs and allegations of the parties and having duly made and filed its findings of fact and conclusions of law, it is (see note 2<sup>nd</sup>)

*Ordered and adjudged,* That ..... the above named claimant, recover herein against the State of New York the sum of ..... (\$.....) in full settlement of said claim.

.....  
*Clerk of the Court of Claims.*

**Notes on the Drafting of Judgments in Claims other than Appropriation Claims.**

**NOTE 1.** Insert here a brief recital showing the nature of the claim and giving the location of the premises affected or the place where the claim accrued.

In all canal claims the judgment must show on its face whether the damage was suffered in connection with the old Erie canal or in connection with the barge canal improvement work. This provision is necessary in order to enable the state comptroller to determine from what canal fund the judgment should be paid.

<sup>1st</sup> See the notes on the drafting of judgments in other than appropriation claims which follow this form.

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**NOTE 2.** Where no proof is offered by the state in opposition to the claim, this paragraph of the judgment should read as follows:

The court having heard the proofs and allegations of the claimant and having determined the legal liability of the state, and the claimant having offered to accept the sum of ..... (\$.....) in full settlement of said claim, and no proof having been offered by the state in opposition thereto, it is

**GENERAL NOTE.** See the general note on page 638 giving additional directions which are applicable to judgments in claims other than appropriation claims as well as to judgments in appropriation claims.

If the award gives interest, leave blank spaces in the judgment for the filling in of the interest dates and the amount of interest. The clerk's office will fill in these dates and will compute the interest.

## II. Procedure to secure payment of judgments. (See section 269 of the code of civil procedure.)

### A. In claims other than appropriation claims.

The claimant must file in the state comptroller's office at Albany the following papers:

1. The certified copy of the judgment which is served upon him by the clerk of the court of claims pursuant to section 269 of the code of civil procedure.
2. The certificate of no appeal which the claimant must secure from the attorney-general. Obviously, if the state intends to appeal, this certificate will not be issued.

Upon the receipt by the state comptroller of the above papers, or upon application to him, he will send to the claimant blank forms of the following papers which also have to be executed and filed in the state comptroller's office:

3. Waiver of attorney's lien which must be executed by the attorney of record for the claimant.
4. Satisfaction of judgment which must be executed by the claimant.
5. Receipt for payment of the judgment which must be executed by the claimant.

### B. In permanent appropriation claims.

In addition to the above papers which claimant must file in the state comptroller's office at Albany, judgments in permanent appropriation claims will not be paid until the attorney-general has filed with the state comptroller "a satisfactory abstract of title and certificate of search as to incumbrances showing the person demanding such damages to be legally entitled thereto." (See section 269 of the code of civil procedure.) It must also be remembered that "unless otherwise ordered by the court or a judge thereof" (see Rule 21), the clerk of the court of claims is not authorized to enter judgment in permanent appropriation claims until the attorney-general has filed in the clerk's office at Albany "his written approval of title to the property appropriated by the state, including his direction as to the claimant or claimants in whose name judgment should be entered." (See Rule 21.)





